LIBRARY
SUPREME COURT, U. S.
Supreme Court, U.S.
FILED
FEB 12 1971
E. ROBERT SEAVER, CLERK

In The

Supreme Court of the United States

October Term, 1970

No. 1345

NOLL MOTORS, INC., Petitioner,

V.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

NELSON, HARDING, MARCHETTI,
LEONARD & TATE
RICHARD P. NELSON AND
WILLIAM A. HARDING
300 N.S.E.A. Building
P. O. Box 82028
Lincoln, Nebraska 68501
and
COLLINS & GRIMM
DAVID COLLINS
Macon, Missouri 63552
Attorneys for Respondent

JOE CHRISTENSEN, INC., 1540 Adams, Lincoln, Nebraska

INDEX

Subject Index

Page

Opinions Below 1
Jurisdiction 2
Questions Presented 2
Statutes Involved 4
Constitutional Provisions Involved 5
Regulations Involved 5
Statement of the Case 6
Reasons for Granting the Writ 8

I. The Board Decision Requiring the Remedy of a Bargaining Order, Which Decision Was Enforced By the Circuit Court, Is In Conflict With Other Board Decisions Issued After the Decision of This Court In N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1969) 8

A. The alleged unfair labor practices in the instant case are not of as serious a nature as those found in other post-*Gissel* cases wherein the Board has refused to issue a bargaining order as a remedy 10

B. The alleged unfair labor practices in the instant case are not nearly as serious as those found in other post-*Gissel* cases wherein the Board has entered bargaining orders as a remedy 17

II. The Decision of the Circuit Court to Enforce the Bargaining Order Remedy Sought By the Board In This Case Is In Direct Conflict With A Recent Decision of the United States Court of Appeals for the Second Circuit 19

III. The Decision of the Circuit Court, In Enforcing the Bargaining Order Requested By the Board Is In Conflict With the Decision of This Court In *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969) Because the Alleged Unfair Labor Practices in the Instant Case Are of A Minor Nature Which, Because of Their Minimal Impact on the Election Machinery, Will Not Sustain A Bargaining Order 21

Page

IV. The Decision of the Board to Issue A Bargaining Order As A Remedy In the Instant Case, and the Decision of the Circuit Court to Enforce Such An Order, Is In Direct Conflict With This Court's Decision In *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969), Due to Misrepresentation on the Part of the Union At the Time of the Signing of the Authorization Cards Which Renders Those Cards Invalid and Incapable of Supporing A Bargaining Order 25

V. The Decision of the Circuit Court Enforcing the Bargaining Order Requested By the Board In the Instant Case Even Though Three Years Had Elapsed Since the Signing of the Authorization Cards and the Commission of the Alleged Unfair Labor Practices, Is Both Inappropriate and In Conflict With Decisions of the United States Court of Appeals for the Fifth Circuit and the Sixth Circuit 28

VI. The Decision of the Circuit Court to Enforce the Bargaining Order Requested By the Board In the Instant Case Is In Direct Conflict With A Recent Report Issued By the United States Senate Committee On the Judiciary Regarding the Power of the Board to Issue Bargaining Orders Under the Taft-Hartley Act 31

VII. The Decision of the Trial Examiner and Board Departed Substantially From Accepted Judicial Procedure and the Circuit Court, In Enforcing the Order Sought By the Board, Departed From the Standards Established By This Court In *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951) 33

VIII. The Decision of the Circuit Court Regarding the Speeches in the Instant Case Is In Direct Conflict With First Amendment Rights and the Provisions of Section 8(c) of the Labor Management Relations Act 36

Conclusion 39

Cases Cited

Page

Aaron Bros., 158 N.L.R.B. 1077 (1966) 22, 23, 24, 25
Amalgamated Clothing Workers v. N.L.R.B., 420 F.2d 1296 (D.C. Cir. 1969) 31
Arbie Mineral Feed Co., 182 N.L.R.B. No. 24, 74 L.R.R.M. 1062 (1970) 18
Atlanta Daily World, 179 N.L.R.B. No. 166, 73 L.R.R.M. 1407 (1969) 18
Blade-Tribune Publishing Co., 161 N.L.R.B. 1512 (1966) 14
Blade-Tribune Publishing Co., 180 N.L.R.B. No. 56, 73 L.R.R.M. 1041 (1969) 9, 14, 20
Boch Dodge, Inc., 177 N.L.R.B. No. 93, 71 L.R.R.M. 1477 (1969) 12
Clarks Gamble Corp. v. N.L.R.B., 407 F.2d 199 (6th Cir. 1969) 29, 30
Clermont's, Inc., 154 N.L.R.B. 1397 (1965) 24
Crystyniak v. N.L.R.B., 415 F.2d 125 (3d Cir. 1969) 31
Dixon Ford Shoe Co., Inc., 150 N.L.R.B. 861 (1965) 24
Don the Beechcomber v. N.L.R.B., 390 F.2d 344 (9th Cir. 1968) 37
Fort Smith Broadcasting Co. v. N.L.R.B., 341 F.2d 874 (8th Cir. 1965) 37
Funkhouser Mills, 132 N.L.R.B. 245 (1961) 35
Garment Workers Local 66, 134 N.L.R.B. 879 (1961) 35
General Stencils, Inc., 178 N.L.R.B. No. 18, 71 L.R.R.M. 1652 (1969) 18
W. T. Grant Co., 177 N.L.R.B. No. 61, 71 L.R.R.M. 1453 (1969) 11
Greyhound Terminal, 137 N.L.R.B. 87 (1962) 24
Hammond & Irving, Inc., 154 N.L.R.B. 1071 (1965) 22, 23, 25
Insurance Agents' National Union, AFL-CIO, 119 N.L.R.B. 768 (1957) 11
Iowa Beef Packers, Inc., 144 N.L.R.B. 615 (1963) 11
Jem Mfg., Inc., 156 N.L.R.B. 643 (1966) 24
Kellogg Mills, 147 N.L.R.B. 342 (1964) 24
Linn v. Plant Guard Workers, 383 U.S. 53 (1966) 36
Longshoremen's Union, 128 N.L.R.B. 198 (1960) 11
P. R. Malory & Co. v. N.L.R.B., 389 F.2d 704 (7th Cir. 1967) 36

Page

N.L.R.B. v. American Cable Systems, Inc., 427 F.2d 446 (5th Cir. 1970), *cert. denied* — U.S. — 75 L.R.R.M. 2810 (1970) 29, 30
N.L.R.B. v. Buitoni Foods, Corp., 298 F.2d 169 (3rd Cir. 1962) 34
N.L.R.B. v. Cactus Petroleum, Inc., 355 F.2d 755 (5th Cir. 1966) 36
N.L.R.B. v. Colvert Dairy Products Co., 317 F.2d 44 (10th Cir. 1963) 37
N.L.R.B. v. Flomatic Corp., 347 F.2d 74 (2d Cir. 1965) 19, 30
N.L.R.B. v. General Stencils, Inc., — F.2d —, 76 L.R.R.M. 2288 (2d Cir. 1971) 20, 39
N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1969) 2, 8, 9, 21, 25, 31, 32, 37
N.L.R.B. v. Golub Corp., 388 F.2d 921 (1967) 38
N.L.R.B. v. Grand Foundries, Inc., 362 F.2d 702 (8th Cir. 1966) 36
N.L.R.B. v. Hannford Bros. Co., 261 F.2d 638 (1st Cir. 1958) 32
N.L.R.B. v. Hawthorne Co., 404 F.2d 1205 (8th Cir. 1969) 37
N.L.R.B. v. Howard Quaries, Inc., 362 F.2d 236 (8th Cir. 1966) 37
N.L.R.B. v. Logan Packing Co., 386 F.2d 562 (4th Cir. 1967) 26
N.L.R.B. v. Riger Togs, Inc., 382 F.2d 198 (2d Cir. 1967) 36, 39
N.L.R.B. v. Rohlen, 385 F.2d 52 (7th Cir. 1967) 36
N.L.R.B. v. Southbay Daily Breeze, 415 F.2d 360 (9th Cir. 1969) 31
N.L.R.B. v. Super-Rex Drugs, Inc., 341 F.2d 7474 (6th Cir. 1965) 37
N.L.R.B. v. T. R. W. Semiconductors, Inc., 385 F.2d 753 (9th Cir. 1967) 36
N.L.R.B. v. Virginia Electric Power Co., 314 U.S. 469 (1941) 36
N.L.R.B. v. W. J. Burns International Detective Agency, Inc., 346 F.2d 897 (8th Cir. 1965) 37
N.L.R.B. v. Yokell, 387 F.2d 751 (2d Cir. 1967) 37
New York v. United States, 342 U.S. 882 (1951) 20

Page

North Country Motors Ltd., 133 N.L.R.B. 1479 (1961) 11
Novak Logging Co., 119 N.L.R.B. 1573 (1958) 11
Olney Motels, Inc., 176 N.L.R.B. No. 111, 71 L.R.R.M. 1516 (1969) 14
Marie Phillips, Inc., 178 N.L.R.B. No. 53, 72 L.R.R.M. 1103 (1969) 28
Poughkeepsie Newspapers, Inc., 177 N.L.R.B. No. 125, 71 L.R.R.M. 1585 (1969) 11
Reliance Fuel Oil Corp., 129 N.L.R.B. 1166 (1961) 11
Schrementi Bros., Inc., 179 N.L.R.B. No. 147, 72 L.R.R.M. 1481 (1969) 12, 20
Snow & Sons, 134 N.L.R.B. 709 (1961) 24
Snyder Tank Corp., 177 N.L.R.B. No. 94, 71 L.R.R.M. 1615 (1969) 18
Southwire Co. v. N.L.R.B., 383 F.2d 235 (5th Cir. 1967) 36
J. P. Stevens & Co., Inc., 179 N.L.R.B. No. 47, 75 L.R.R.M. 1375 (1969) 18
Stoutco, Inc., 180 N.L.R.B. No. 11, 73 L.R.R.M. 1107 (1969) 16, 20
Teamsters, Chauffeurs and Helper's Union Local 279, 140 N.L.R.B. 164 (1962) 34
Thomas v. Collins, 323 U.S. 516 (1945) 36
United States v. Wunderlich, 342 U.S. 98 (1951) 20
Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951) 20, 23
V & H Industries, 177 N.L.R.B. No. 118, 71 L.R.R.M. 1549 (1969) 17
World Carpets, Inc., 176 N.L.R.B. No. 138, 71 L.R.R.M. 1353 (1969) 17

Statutes and Regulations

29 *C.F.R.* § 102.35 (1968) 6
29 *C.F.R.* § 102.35(d) (1968) 27
29 *C.F.R.* § 102.35(h) (1968) 27
29 *C.F.R.* § 102.39 (1968) 6
29 *C.F.R.* § 102.45 (1968) 35
5 *U.S.C.* § 557(c) (1967) 5, 35
5 *U.S.C.* § 706 (1967) 10, 20
28 *U.S.C.* § 1254(1) (1966) 2

Page

29 *U.S.C.* § 157 (1965) 4, 28
29 *U.S.C.* § 158(a)(c) (1965) 4

Miscellaneous

3 BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE § 1302 (1958) 27
Swigert, *Bargaining Orders Based on Cards after Loss of Election*, 70 LAB. REL. REP, 139 (1969) 29, 32
STAFF OF SENATE COMM. ON THE JUDICIARY, 91ST CONG., 1ST SESS., SUBCOMM. REPORT ON SEPARATION OF POWERS (N.L.R.B.) at 9 (Comm. Print 1970) 31
2 DAVIS, ADMINISTRATIVE LAW § 14.07 (1958) 25

In The

Supreme Court of the United States

October Term, 1970

No. ——

NOLL MOTORS, INC., Petitioner,

V.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Noll Motors, Inc. prays that a Writ of Certiorari issued to review the decision of the United States Court of Appeals for the Eighth Circuit, entered in case No. 19572 on November 4, 1970. Pursuant to an Order of the Circuit Court, the Mandate in Case No. 19572 has been stayed to and including February 11, 1971 to allow the Company to file a Petition for a Writ of Certiorari in this case.

OPINIONS BELOW

The first decision of the National Labor Relations Board in this case is reported at 168 N.L.R.B. 1029 (1967) and is set out in Appendix C to this petition at page 50. Upon motion of the Board, the case was re-

manded for reconsideration in light of *N.L.R.B.* v. *Gissel Packing Co.*, 395 U. S. 575 (1969), and the decision upon remand is designated as 180 N.L.R.B. No. 60 (1969). This case is not yet officially reported, but it is unofficially reported at 73 L.R.R.M. 1036 (1969), and is set out in Appendix B to this petition at page 46. The Decision of the Circuit Court enforcing this order is not officially reported yet but it is unofficially reported at 75 L.R.R.M. 2513 (8th Cir. 1970), and is set out in Appendix A to this Petition at page 40.

JURISDICTION

Jurisdiction to review by writ of certiorari the judgment and decision of the United States Court of Appeals for the Eighth Circuit entered on November 4, 1970 is invoked under the provisions of 28 U.S.C. § 1254 (1) (1966).

QUESTIONS PRESENTED

1. Whether or not the bargaining order in the instant case should be enforced due to the fact that the Board has declined to request or issue bargaining orders in other post-*Gissel* cases where the case for a bargaining order was just as strong, if not stronger than the one in the instant case.

2. Whether or not a bargaining order should issue in the instant case in light of the fact that the alleged unfair labor practices in the instant case are not nearly as serious as those found in other post-*Gissel* cases wherein the Board has found it necessary to use a bargaining order.

3. Whether or not the United States Court of Appeals for the Second Circuit is correct in concluding that the Board must give like cases like treatment, or whether the United States Court of Appeals

for the Eighth Circuit is correct in disregarding that consideration in the instant case.

4. Whether or not a bargaining order should issue in a case which involves unfair labor practices of a minor nature which because of their minimal impact on the election machinery will not preclude the holding of a secret ballot election.

5. Whether or not a bargaining order should be entered in a situation wherein the union organizer has deliberately and clearly misrepresented the purpose of authorization cards at the time of their signing.

6. Whether or not a bargaining order should be issued in the instant case in light of the fact that it has been three years since the signing of the authorization cards at issue and since the commission of the alleged unfair labor practices.

7. Whether or not the United States Court of Appeals for the Fifth Circuit is correct in concluding that not all past unfair labor practices preclude the holding of a fair secret ballot election at present or whether the United States Court of Appeals for the Eighth Circuit was correct in disregarding that consideration in the instant case.

8. Whether or not the United States Court of Appeals for the Sixth Circuit is correct in concluding that the passage of a protracted period of time since the signing of authorization cards may well render those cards invalid as indicators of the present wishes of company employees or whether the United States Court of Appeals for the Eighth Circuit was correct in disregarding such a consideration in the instant case.

9. Whether or not bargaining orders may even be issued by the National Labor Relations Board.

10. Whether or not a Trial Examiner is required to

resolve conflicting testimony and make credibility resolutions and whether or not his failure to do so is a departure from accepted judicial procedure.

11. Whether or not an employer may make any predictive statements about the precise effects that he feels unionization would have on his company.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act involved in the instant case read as follows:

Section 7

> Employees shall have the right to self-organization to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . . *See* 29 U.S.C. § 157 (1965).

Section 8

> (a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;
>
> * * *
>
> (c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute to be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit. *See* 29 U.S.C. § 158 (a)(c) (1965).

The relevant provisions of the Administrative Procedure Act involved in the instant case reads as follows:

Section 8

(b) * * *

All decisions, including initial, recommended and tentative decisions, are a part of the record and shall include a statement of

(a) findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record. . . . *See* 5 U.S.C. § 557(c) (1967).

CONSTITUTIONAL PROVISIONS INVOLVED

The articles in addition to, and amendment of the Constitution of the United States of America involved in the instant case read, in pertinent part, as follows:

ARTICLE I

Congress shall make no law . . . abridging the freedom of speech. . . . *See* U. S. CONST. amend. I.

ARTICLE V

No person shall be . . . deprived of life, liberty or property, without due process of law. . . . *See* U. S. CONST. amend. V.

REGULATIONS INVOLVED

The provision of the N.L.R.B. Rules and Regulations involved in the instant case reads as follows:

Sec. 102.35 *Duties and Powers of Trial Examiners.*

* * *

The trial examiners shall have authority, with respect to cases assigned to him, between the time he is designated and transfer of the case to the Board, subject to the Rules and Regulation of the Board and within its powers:

* * *

(d) To rule upon offers of proof and receive

relevant evidence;

* * *

(h) to dispose of procedural requests or similar matters, including motions referred to the trial examiner by the Regional Director and motions to amend pleadings; also to dismiss complaints or portions thereof, and to order hearings reopened or, upon motion, consolidate it prior to issuance of trial examiner's decisions;

Sec. 102.39 *Rules of Evidence Controlling so far as Practicable*—Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the District Courts of the United States and under the rules of civil procedure for the District Courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., Title 28, Secs. 723-b, 723-c). *See* 29 C.F.R. §§ 102.35 and 102.39 (1968).

STATEMENT OF THE CASE

On November 6, 1966, District No. 9 of the International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter referred to as the union) began an organizing campaign among the employees of Noll Motors, Inc. (hereinafter referred to as the Petitioner or the Company) at Moberly, Missouri (A.32).[1] The union subsequently filed a petition with the National Labor Relations Board (hereinafter referred to as the Board) for a representation election (A.14, 81), and an election was held on January 16, 1967 for the company's employees, in which 15 employees voted against the union, 10 employees voted for the union and one vote was challenged (A.81). On January 23,

[1] References designated "A" are to the printed Appendix before the United States Court of Appeals for the Eighth Circuit in case No. 19572.

1967, the union filed objections to the conduct of the election and an unfair labor practice charge.

A hearing was held on April 27, 1967 in Moberly, Missouri by a Trial Examiner for the Board at which time evidence was taken relating to the complaint filed by the General Counsel of the Board. After the close of the April 27, 1967 Board hearing the Trial Examiner received and entered into evidence as Trial Examiner's Exhibit Nos. 3 and 4 (a) (5), a letter he received that was signed by 14 of the company's employees stating that they wanted "no part of the union."[2] Seven of these 14 employees had signed union authorization cards and they indicated in this letter of May 5, 1967 that they had been mislead by the union into believing that the signing of the union authorization cards was "only a formality to allow an election" (A.19). Based upon the fact that the union authorization cards "clearly stated" their purpose, the Trial Examiner was "not disposed to consider at this late date evidence of doubtful weight, to the contrary." (A.19).

The Trial Examiner concluded that the company had violated the National Labor Relations Act (hereinafter referred to as the Act) and had committed unfair labor practices by making two speeches to employees, one of which was given by the company president and one of which was written by the company president and delivered by a company supervisor. In addition, the conversation between the company garage manager and two employees about possible transfer to another machine was found to be a "promise of benefits" to not vote for the union and also a violation of the Act. The Trial Examiner recommended that the representation election of January 16, 1967 be set aside (A.20);

---

[2] For the text of this letter see Appendix E to this petition at page 82.

and further, that the company cease and desist from any activity in violation of the Act, and be ordered to enter into bargaining with the union (A.21-22). The company took exceptions to the Trial Examiner's decision and recommended order but the Board affirmed the Trial Examiner's decisions and petitioned the United States Court of Appeals for the Eighth Circuit for an order of enforcement (A.2-3).

Briefs were filed with the Circuit Court, but before oral argument was heard, this court decided *N.L.R.B.* v. *Gissel Packing Co.*, 395 U. S. 575 (1969) on June 16, 1969. Upon a motion by the Board, the case was remanded to the Board for reconsideration of various issues raised by the decision in *Gissel* case. The parties submitted statements of position to the Board and on September 16, 1969 the Board issued a supplemental decision and order wherein the Board reaffirmed its first decision and order, even though Board member Zagoria once again dissented from the conclusion that the second of the two speeches in the instant case constituted an unfair labor practice. Thereafter, the Board petitioned the United States Court of Appeals for the Eighth Circuit for enforcement of its supplemental decision and order and, in a decision dated November 4, 1970, the Circuit Court enforced the order of the Board.

REASONS FOR GRANTING THE WRIT

I.

The Board decision requiring the remedy of a bargaining order, which decision was enforced by the Circuit Court, is in conflict with other Board decisions issued after the decision of this Court in N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1969).

In 1969, this Court determined that there are two situations wherein the Board may enter a bargaining

order as a remedy for employer unfair labor practices in violation of the Labor Management Relations Act. *See N.L.R.B.* v. *Gissel Packing Co.*, 395 U. S. 575 (1969). As Chief Justice Warren noted, the Board may properly enter a bargaining order as a remedy in the "exceptional" case which is marked by "outrageous" and "pervasive" unfair labor practices. *See* 395 U. S. at 613. Chief Justice Warren also noted that the Court approved of "the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process." *See* 395 U. S. at 614.

Beyond these two categories, Chief Justice Warren delineated a third category wherein the Board was not justified in using a bargaining order as a remedy, by stating that:

> We emphasize that under the Board's remedial power there is still a third category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order. *See* 395 U. S. at 615.

The instant case had not yet been set for oral argument before the Circuit Court when this Court's decision in the *Gissel* case issued. Accordingly, upon motion of the Board, the case was remanded to the Board for reconsideration in light of this Court's decision in the the *Gissel* case.[3]

---

[3] In a letter to Counsel dated April 27, 1970, Mr. Thomas W. Miller, Jr., the Director of Information for the National Labor Relations Board, indicated that this procedure was followed in a number of cases pending before Circuit Courts when the decision of this Court in *Gissel* issued. According to Mr. Miller, 75 cases were remanded from various United States Circuit Courts of Appeal and of those 75 remands, the Board had reversed its pre-*Gissel* decision in only *Blade-Tribune Publishing Co.*, 180 N.L.R.B. No. 56, 73 L.R.R.M. 1041 (1969). Additionally, in a letter to Counsel dated May 6, 1970, Mr. Standeau E. Weinbrecht, the Chief of the Legal

However, in the supplemental decision in the instant case, as was the case in most of its post-*Gissel* decisions, the Board did not establish any clear guidelines as to how the decision was made to place the unfair labor practices at issue within either of the first two categories described by Chief Justice Warren in the *Gissel* case and thereby justify the remedy of a bargaining order. Without such definitive guidelines, the Petitioner suggests that a comparison of the post-*Gissel* decisions issued by the Board will aid in determining whether or not a bargaining order was properly entered in the instant case. On such a comparative basis, the Petitioner contends that the decision of the Board to issue a bargaining order in this case, and the decision of the Circuit Court to enforce such an order, constituted an arbitrary and capricious abuse of discretion in violation of the Administrative Procedures Act and also constitutes a significant violation of the petitioner's due process and equal protection rights under the United States Constitution. *See* 5 U. S. C. § 706 (1967); U. S. CONST. amend. V.

A. The alleged unfair labor practices in the instant case are not of as serious a nature as those found in other post-Gissel cases wherein the Board has refused to issue a bargaining order as a remedy.

The Petitioner submits that the alleged unfair labor practices in the instant case are not of as serious a nature as those in other post-*Gissel* cases wherein the Board refused to issue a bargaining order as a remedy. The Petitioner draws the Court's attention to this fact because, as acknowledged by the Board itself, only by recognition of previous Board decisions "will a uni-

---

Research and Special Projects branch of the National Labor Relations Board, indicated that only four cases remanded from Circuit Courts in light of this Court's decision in *Gissel* were still pending as of that date.

form and orderly administration of a national act, such as the National Labor Relations Act, be achieved." *See Iowa Beef Packers, Inc.*, 144 N.L.R.B. 615, 616 (1963); *see also Insurance Agents' National Union, AFL-CIO*, 119 N.L.R.B. 768, 773 (1957); *Novak Logging Co.*, 119 N.L.R.B. 1573, 1575-76 (1958); *Longshoremen's Union*, 128 N.L.R.B. 198, 205-206 (1960); *Reliance Fuel Oil Corp.*, 129 N.L.R.B. 1166, 1177 (1961); *North Country Motors Ltd.*, 133 N.L.R.B. 1479, 1485 (1961). The Petitioner submits that the failure of the Board to apply the same standards to the instant case as it did to other post-*Gissel* cases wherein, upon more flagrant factual situations, the Board refused to issue a bargaining order presents a substantial federal question and an adequate reason for the granting of the petition in this case.

For example, in *W. T. Grant Co.*, 177 N.L.R.B. No. 61, 71 L.R.R.M. 1453 (1969), the employer engaged in questioning prior to the election and on the day of the election regarding the sentiments of his employees concerning the union and current company benefits. The employer also instituted a new break schedule for his employees during the union organizing campaign and started paying employees for time spent in attending meetings for the company before working hours. However, the Board in that case concluded that the unfair labor practices were "not the kind that will support a bargaining order." *See* 71 L.R.R.M. at 1454. Similarly, in *Poughkeepsie Newspapers, Inc.*, 177 N.L.R.B. No. 125, 71 L.R.R.M. 1585 (1969), the employer was found guilty of unfair labor practices by cutting off loans to employees on their required bond balances and by threatening to interfere with other jobs in various ways if the union was voted in, and by promising benefits if no union was voted in. However, in that case,

the Board viewed the implied benefits and threats as minimal and stated that: "These few violations, occurring in a unit of 52 employees in our opinion, are not of sufficient gravity to support a Section 8(a) (5) finding or a bargaining order." *See* 71 L.R.R.M. at 1587.

In *Boch Dodge, Inc.*, 177 N.L.R.B. No. 93, 71 L.R.R.M. 1477 (1969), the employer was found guilty of interrogating salesmen concerning their union membership or activities, threatening salesmen with reprisals if they chose the union as their bargaining representative, promising salesmen benefits to induce them to abandon the union, soliciting some of the employees to prevail upon their fellow employees to cease their employment with the employer for the purpose of discouraging union activity, and soliciting some of the employees to prevail upon their fellow employees to not file unfair labor practice charges against the employer. In fact, a reprisal taken against one employee was not found to be a violation of the National Labor Relations Act because the employer had already succeeded in winning the salesmen back to his side, and in getting them to discontinue their strike. Thus, in a situation in which the employer was guilty of numerous unfair labor practices, and even after the union's majority had been significantly dissipated, the Board still did not find the contemporaneous unfair labor practices significant enough to justify the issuance of a bargaining order.

In *Schrementi Bros., Inc.*, 179 N.L.R.B. No. 147, 72 L.R.R.M. 1481 (1969), the store owner was found guilty of assaulting two union agents in his store. The testimony indicated that the store owner physically assaulted the two union organizers, told them to leave the store in rather colorful terms, threatened to kill the two union organizers or to get someone to kill them for

him, pushed the two union organizers out the door and challenged them to fight in the parking lot. When two different union organizers appeared in the store approximately one week later, the store owner again demanded that the organizers leave the store, again pushed the organizers physically out of the store, and struck at least one of the organizers with his fist. Once outside, the store owner caught sight of the first two organizers sitting in a car, and he approached the car and demanded to fight with them. When they declined, he tried to pull one of the organizers out of the automobile, and when that proved unsuccessful, he kicked the side of the car. In addition to these unfair labor practices, the Board also affirmed the Trial Examiner's conclusions that the store owner, the store assistant manager and at least one supervisor interrogated a number of employees. Nevertheless, the Board concluded that the company's misconduct "was not sufficiently flagrant to prevent the conduct of a fair rerun election." *See* 72 L.R.R.M. at 1484.

In another case, the employer systematically interviewed individually 13 of his employees and asked them whether or not they wanted to be represented by the union. The employer also gave raises of 15¢ to 20¢ an hour to several employees prior to the election and made a practice of taking employees, either singly or in pairs, to lunch as a part of a pre-election campaign against the union. Although the normal lunch period for these employees was 30 minutes, the employer extended these lunch periods prior to the election from 35 minutes to one hour, and the employees were not docked for the extra time. During these luncheons, the employer asked the employees what they thought of the union and mentioned pay raises that the employees would receive as well as a pension plan that the employer told the employees would be worked out in the

near future. *See Blade-Tribune Publishing Co.*, 161 N.L.R.B. 1512 (1966). Upon reconsideration, in light of this Court's decision in *Gissel*, the Board concluded that the violations were not serious enough to require the issuance of a bargaining order. *See Blade-Tribune Publishing Co.*, 180 N.L.R.B. No. 56, 73 L.R.R.M. 1041 (1969).

In another post-*Gissel* case, the owner and two supervisors interrogated employees concerning their union sympathies or activities, the owner threatened to limit work breaks if the union was authorized and also told employees that they would get a raise when the election was over. The owner also promised to buy uniforms for his employees and promised that if the employees would refer complaints to him in writing, he would see that the complaints were satisfied. The owner also created the impression of surveillance on at least two occasions, a supervisor told an employee that if the union came in, the employer could just close down the restaurant or put "no tipping" signs on the restaurant tables, and the owner granted wage increases to two employees prior to the election under a "new policy" which he announced approximately one week prior to the election. The employer also discharged two waitresses that he knew to be the main union organizers. Even though the Board found the Respondent guilty of these unfair labor practices, no bargaining order was issued. *See Olney Motels, Inc.*, 176 N.L.R.B. No. 111, 71 L.R.R.M. 1516 (1969).

In the instant case, the Board relied upon two speeches and one conversation a supervisor had with two employees. According to the Board, the company president told the employees at the first meeting that if the union "got in" he would have to operate on a strictly production basis, and he was sure that all the employ-

ees could not make out on such an arrangement.[4] At the second meeting, a supervisor read a speech prepared by the company president which stated in part that unions make trouble, cause strikes, and that the union could call a strike whether or not the employees could make their monthly payments, and that unions elsewhere had caused loss of jobs, that a plant where the union had won an election had closed even though the company president did not know whether or not it closed because of the union. Only two of the three Board members deciding this case on remand decided that this speech was illegal. In addition to the two meetings, two employees approached the garage manager and asked him if they could be assigned to another machine, and he told them he could not talk to them about assignment prior to the election, and he would not have the power to do so if the union won the election, but "maybe" he could help them get what they wanted if the union did not win the election.

Thus, the instant case presents a situation wherein only three unfair labor practices are relied upon by the Board, and even the Board cannot agree that all three of those constitute unfair labor practices. Yet, the Board still has concluded that a bargaining order is necessary. However, as noted in the previously listed cases, other employers have committed unfair labor practices of a much more serious nature and many more unfair labor practices than are found in the instant case. Under either a quantity or quality test, the petitioner submits that the failure of the Board to treat the company in this case as it did the employers in the previously mentioned cases constitutes a violation of the Con-

---

[4] The petitioner does not agree that the matter of the union was ever even discussed at this first speech and apparently the Trial Examiner agreed, as noted by the petitioner in Argument *VII infra.*

stitution of the United States, the Administrative Procedure Act, and shows that the board is not administering the Federal Statutes that it is emowered to enforce with an even hand.

In fact, the petitioner draws the Court's attention to *Stoutco, Inc.*, 180 N.L.R.B. No. 11, 73 L.R.R.M. 1107 (1969), as an example of a nearly parallel fact situation wherein the Board declined to issue a bargaining order. In the *Stoutco* case, a company foreman on numerous occasions threatened loss of existing benefits, and plant closing or the imposition of harsher working conditions if the union "got in". These unfair labor practices would apparently correspond to the remarks that the Board attributes to the first speech made by the president of the company, even though the remarks in the *Stoutco* case go somewhat beyond the remarks in this case. In the *Stoutco* case a foreman also made unlawful interrogations and promises of benefit to employees in an attempt to dissuade them from joining or supporting the union. This unfair labor practice would apparently correspond to the one conversation and "implied promise of benefits" found in the instant case, even though the promises and interrogations in the *Stoutco* case went considerably beyond those found in this case. Also in the *Stoutco* case the company president invited an employee to quit and predicted that the employee would be gone by the first Friday following the scheduled election and the Board found that this was an attempt to coerce him to withdraw his support from the union. So too, in the instant case the Board apparently considers the second speech of the company president to be an attempt to coerce employees to withdraw their support from the union, even though one of the Board members did not consider the speech to be a violation of the Act at all. In the *Stoutco* case, the Board scheduled a second

election, and in the instant case the Board issued a bargaining order. The petitioner submits that the disparity found in these two quite parallel cases serves as an ample indication to this Court that the Board is not administering the National Labor Relations Act with an even hand and that the petition in the instant case should be granted so that this Court will have an opportunity to either require the Board to clearly articulate the standards that were used to apply the *Gissel* decision, or so that this Court will have an opportunity to itself clearly articulate how the Board should apply the *Gissel* decision.

B. The alleged unfair labor practices in the instant case are not nearly as serious as those found in other post-Gissel cases wherein the Board has entered bargaining orders as a remedy.

In most of the post-*Gissel* cases wherein the Board has issued bargaining orders it is very difficult to ascertain what standards have been applied by the Board in concluding that the unfair labor practices committed by the employer were flagrant enough to fall within one of the two categories set forth by Chief Justice Warren in the *Gissel* case as requiring the issuance of a bargaining order. The difficulty is found in the fact that most of these decisions have consisted of one paragraph wherein the Board has crypticly stated that it has reconsidered the case in light of the standards announced in *Gissel* and has concluded that a bargaining order is justified. However, there have been a few cases when the Board has attached labels to the type of unfair labor practice found and has then resorted to the bargaining order for a remedy. *See e.g., World Carpets, Inc.*, 176 N.L.R.B. No. 138, 71 L.R.R.M. 1353 (1969) (consistent and insistent campaign of unfair labor practices); *V & H Industries*, 177 N.L.R.B. No.

118, 71 L.R.R.M. 1549 (1969) (tended to undermine the union's majority and make a fair election an unlikely possibility); *Snyder Tank Corp.*, 177 N.L.R.B. No. 94, 71 L.R.R.M. 1615 (1969) (clearly designed to and did undermine the union's support, and destroyed the conditions necessary to the holding of a free election); *General Stencils, Inc.*, 178 N.L.R.B. No. 18, 71 L.R.R.M. 1652 (1969) (widespread unfair labor practices with a lingering effect); *Atlanta Daily World*, 179 N.L.R.B. No. 166, 73 L.R.R.M. 1407 (1969) (consistent pattern of unlawful conduct); *J. P. Stevens & Co., Inc.*, 179 N.L.R.B. No. 47, 75 L.R.R.M. 1375 (1969) (campaign of extensive and egregious unfair labor practices); *Arbie Mineral Feed Co.*, 182 N.L.R.B. No. 24, 74 L.R.R.M. 1062 (1970) (lingering coercive effect).

One thing that does seem to stand out in all of the previously mentioned cases is that the employer had engaged in a substantial number of unfair labor practices and had also engaged in unfair labor practices of a serious type, such as discharges, which were part of an overall campaign against the union. The Board made absolutely no finding that the Petitioner, herein, had engaged in any overall campaign against the union but did conclude that they were unfair labor practices which were calculated to undermine the union's majority status and "of such a nature as to render doubtful that the coercive effects could be eliminated by traditional remedies so as to insure a fair election." However, the Board did not explain how it reached this conclusion, and such an explanation would certainly seem to have been justified in light of the fact that one of the three Board members deciding the case did not agree that one of the two speeches even constituted a violation of the Act. The difficulty is increased when it is realized that the decision of the Board making

such a broad general claim was issued on December 16, 1969, nearly three years after the alleged unfair labor practice took place. Yet, the Board does not indicate how any of the coercive effects would still preclude a fair election.

The Petitioner submits that a review of other post-*Gissel* cases wherein the Board has issued a bargaining order leads to the obvious conclusion that the three unfair labor practices in the instant case do not reach the same level in either quantity or nature. Accordingly, the Petitioner submits that the Board in the instant case indiscriminately issued a bargaining order without making any serious attempt to actually determine whether or not such a remedy was appropriate under the standards established by this Court in *Gissel*. In addition to the damaging effect such a practice places upon the federal law in question, the Petitioner notes that the "strong medicine" of a bargaining order in any instance may have potentially adverse effects on the Section 7 rights of the employees. *See N.L.R.B.* v. *Flomatic Corp.*, 347 F.2d 74, 78 (2d Cir. 1965). Thus, the Petitioner urges this Court to grant its petition in order that the manner in which the Board has applied bargaining orders after the *Gissel* case may be adequately examined.

II.

The decision of the Circuit Court to enforce the bargaining order remedy sought by the Board in this case is in direct conflict with a recent decision of the United States Court of Appeals for the Second Circuit.

Even though the Petitioner urged the United States Court of Appeals for the Eighth Circuit to reject the bargaining order remedy requested by the Board due to the manner in which the Board has haphazardly and indiscriminately issued bargaining orders in post-*Gis-*

sel cases, the lower court nevertheless enforced the bargaining order sought by the Board in this case. However, the United States Court of Appeals for the Second Circuit has recently disagreed with this type of an abdication of judicial authority. *See N.L.R.B.* v. *General Stencils Inc.*, — F. 2d —, 76 L.R.R.M. 2288 (2d Cir. 1971).

In the *General Stencils* case, Circuit Judge Friendly made specific reference to the three Board cases of *Stoutco, Inc. supra, Schrementi Bros., Inc., supra,* and *Blade-Tribune Publishing Co., supra,* and noted that the unfair labor practices in those cases would seem to cast more doubts on the likelihood of a fair election than those established in the *General Stencils* case. Judge Friendly also noted that the Board had made no attempt to explain the difference in treatment between the cases other than the *ipse dixit* that the factual situations in those cases fell within the third category described by Chief Justice Warren in the *Gissel* case. Circuit Judge Friendly reasoned that:

> The Supreme Court's emphasis in fn. 32 of the *Gissel* opinion, on the respect to be given the Board's decisions concerning the appropriate remedy surely was not meant totally to overrule in this area the famous statement in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U. S. 474, 490 (1951), that "reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function," including the responsibility placed on them by the Administrative Procedure Act, 5 U.S.C. § 706 (2) (a), to prevent capricious determinations by administrative agencies. *See* the remarks of Mr. Justice Douglas dissenting in *United States* v. *Wunderlich*, 342 U. S. 98, 101 (1951), and *New York* v. *United States*, 342 U. S. 882, 884 (1951). Bargaining orders are not immune from the great principle that like cases must receive like treatment. While the Board has

> wide discretion in framing remedies, the agency has a correlative duty to explain its imposition of a remedy in one case and its failure to do so in a seemingly similar—or even stronger—one on a basis reviewing courts can understand. *See* 76 L.R.R.M. at 2296.

Judge Friendly then relied upon the "lack of intelligible explanation of apparently differing results" in the other Board cases where the case for a bargaining order was at least as strong but in which no bargaining order was issued and vacated the bargaining order and remanded that portion of the case to the Board for "further proceedings not inconsistent with this opinion."

The Petitioner submits that this conflict in the circuit courts as to whether or not they will "rubber stamp" Board orders that require a bargaining order, without an adequate explanation as to why no bargaining order was entered in similar cases serves as an ample reason for this Court to grant the petition in the instant case and to resolve this dispute between the Circuit Courts. The petitioner submits that the importance of granting the petition in the instant case is highlighted by virtue of the haphazard and indiscriminate manner in which the Board has been issuing, or declined to issue, bargaining orders since the decision by this Court in *Gissel*.

III.

The decision of the Circuit Court, in enforcing the bargaining order requested by the Board is in direct conflict with the decision of this Court in N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1969), because the alleged unfair labor practices in the instant case are of a minor nature which, because of their minimal impact on the election machinery, will not sustain a bargaining order.

The Petitioner submits that even without reference to other post-*Gissel* decisions decided by the Board,

the factual situation presented in the instant case falls within the third category outlined by Chief Justice Warren in the *Gissel* case wherein a bargaining order is not justified and that therefore the decision of the Circuit Court to the contrary is in direct conflict with the decision of this Court in *Gissel*. The Petitioner submits that this conclusion may be reached simply by referring to the supporting authority used in the *Gissel* decision itself.

For example, the decision in *Gissel* noted that not every unfair labor practice requires the issuance of a bargaining order and relied upon the two previous Board cases of *Aaron Bros.*, 158 N.L.R.B. 1077 (1966) and *Hammond & Irving, Inc.*, 154 N.L.R.B. 1071 (1965). Even though both the *Hammond* and the *Aaron Bros.* cases are concerned with the no-longer-applicable test of an employer's good faith doubt in not recognizing the union as the collective bargaining agent for employees, both of these cases establish important standards in determining whether or not an employer's unfair labor practices fall within the *de minimus* rule. For example, in the *Hammond* case, the employer engaged in interrogation of at least six employees out of a unit of approximately 110 in the "critical period" prior to the election. The Trial Examiner found that these conversations constituted interrogation and created impressions of surveillance in violation of Section 8 (a)(1) of the National Labor Relations Act. The Board agreed, but also agreed that not all cases of violations of the Act require the issuance of a bargaining order.

While the Board refused to issue a bargaining order in the *Hammond* case, it indicated that it might do so in other cases wherein an employer refuses to bargain with the union because the employer "rejects the collective-bargaining principle or desires to gain time within

which to undermine the union and dissipate its majority." See 154 N.L.R.B. at 1073. The Board stated further that in determining whether or not an employer's action is taken to achieve either of these two invalid purposes, the Board will consider "all the surrounding circumstances as well as direct evidence of motivation" and that in the absence of direct evidence, the Board would issue a bargaining order in cases where "extensive violations of the Act" accompanied the refusal to grant recognition. *Id.*

In the instant case, the company president quite clearly indicated in his second speech that he was not rejecting the collective bargaining principle by stating that "we would bargain in good faith," "you have every right to vote union or not as you choose," and "I can hire experts to negotiate for me." In addition, there is absolutely no evidence in the instant case to indicate that the company ever attempted to gain time within which to undermine the union or that the company in any way delayed the representation proceedings.

The Board expanded on the *Hammond* doctrine and the *Aaron Bros.* case by stating that a determination of whether or not an employer was refusing to recognize the union in good or bad faith was a determination which:

> of necessity must be made in the light of all the relevant facts of the case, including any unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct. *See* 158 N.L.R.B. at 1079.

The Board then pointed out that: 1) Not all unfair labor practices are of such a character as to reflect a purpose to evade "an obligation to bargain" and do not require an inference of bad faith and the issuance of a

bargaining order; (In making this statement, the Board relied upon the *Hammond* case and *Clermont's, Inc.*, 154 N.L.R.B. 1397 (1965))[5] and 2) An employer's bad faith may be demonstrated by a course of conduct on the part of the employer which manifests the employer's rejection of the collective-bargaining concept and a desire to seek delay. In support of this conclusion, the Board relied upon a number of cases wherein the employer agreed to a card check and then repudiated the results of the card check and demanded an election.[6]

The Petitioner submits that the course of conduct followed by the company in the instant case clearly shows that the company was not in any way attempting to evade an obligation to bargain, reject the collective-bargaining concept or seek delay. Rather, the company in the instant case did not engage in any massive campaign against the union, but only gave two speeches to employees and indicated clearly in one of the speeches that the company would bargain with the union in good faith if the union were voted in by the employees and that the decision as to whether or not

---

[5] In the *Clermont* case the Board acknowledged that the company had engaged in admitted interrogation and surveillance of employees regarding their union activities and that the store manager had threatened to fire any union supporters that he found out about and the store owner had stated that the company would not allow the union to come in and the company would "close down the store and burn it" rather than letting the union represent the employees. The Board did reject the Trial Examiner's conclusion that the company had unlawfully transferred an employee union-supporter and concluded that the unfair labor practices present were "hardly serious enough" to support a finding that the company had refused to bargain with the union in order to gain time to undermine the union's majority status and that the unfair labor practices in themselves were not serious enough to require a bargaining order. The facts of the instant case would seem to fall well within this definition of those cases not requiring a bargaining order.

[6] *See Snow & Sons*, 134 N.L.R.B. 709 (1961); *Dixon Ford Shoe Co., Inc.*, 150 N.L.R.B. 861 (1965); *Kellogg Mills*, 147 N.L.R.B. 342 (1964); *Greyhound Terminal*, 137 N.L.R.B. 87 (1962); and *Jem Mfg., Inc.*, 156 N.L.R.B. 643 (1966).

the employees would vote for or against the union was up to the employees.

Upon this factual situation, and in reliance upon the doctrines set forth by the Board in the *Hammond* case and the *Aaron Bros.* case, which cases were relied upon by this Court in issuing the *Gissel* decision, the Petitioner submits that the conclusion is compelled that a bargaining order is not justified in the instant case. Thus, the petitioner submits that the issuance of a bargaining order in the instant case by the Board, and the decision of the Circuit Court to enforce that order is in clear conflict with the standards set forth by this Court in *Gissel* and serves as an ample reason for the granting of the petition in the instant case.

IV.

The decision of the Board to issue a bargaining order as a remedy in the instant case, and the decision of the Circuit Court to enforce such an order, is in direct conflict with this Court's decision in N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1969), due to misrepresentation on the part of the union at the time of the signing of the authorization cards which renders those cards invalid and incapable of supporting a bargaining order.

In *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575 (1969) Chief Justice Warren referred to authorization cards as "admittedly inferior to the election process" and stated that:

> We would be closing our eyes to obvious difficulties of course, if we did not recognize that there have been abuses, primarily rising out of misrepresentations by union organizers as to whether the effect of signing a card was to designate the union to represent the employee for collective bargaining purposes or merely to authorize it to seek an election to determine that issue. And we would be equally blind if we did not recognize that various Courts of Appeals and commentators have dif-

> fered significantly as to the effectiveness of the Board's *Cumberland Shoe* doctrine to cure such abuses.
>
> * * *
>
> In resolving the conflict upon the circuits in favor of approving the Board's *Cumberland* rule, we think it is sufficient to point out that employees should be bound by the clear language of what they sign *unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. See* 395 U. S. at 604-606 (footnotes omitted and emphasis supplied).

An example of the misrepresentation used by the union in the instant case is found in the union's comment to the employees "that before they did anything they were going to get all the dealers, garages and filling stations to sign up." (TRX App. A,79), which course of action was not pursued by the union and undoubtedly had the effect of misleading the company's employees into believing that they were participating in a mass community signup. This misrepresentation is quite significant and should be held to invalidate the authorization cards in this case. Indeed, as Chief Justice Haynsworth noted in *N.L.R.B.* v. *Logan Packing Co.*, 386 F. 2d 562, 566 (4th Cir. 1967), there is a "natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees."

Even more indicative of the misrepresentation in the instant case is the fact that seven of the fifteen employees who signed cards gave notice to the Board in a May 5, 1967, letter that they were lead to believe that they were signing the union cards as "only a formality to allow an election" and that they, therefore, had decided that they wanted no part of the union. *See* Trial Examiner's Exhibits 3 and 4 set out in Appendix E to

this Petition at page 82. Even though the Trial Examiner was in possession of this information prior to rendering his decision, and even though the information was incorporated into the record as a Trial Examiner's exhibit, the Trial Examiner made no effort to investigate the matter and simply stated that he was "not disposed to consider at this late date" the evidence contained in his own exhibits.[7]

In addition, record evidence indicates that the union told one of the employees who did not attend an initial organizing meeting that his signature was required "because they didn't have enough cards to call an election." The fact that this misleading promise might well have been used by the union during its organizing campaign is easily seen from the fact that the union did indeed petition the Board for an election on November 28, 1966, before ever making the company aware of its majority status claim based upon signed authorization cards. This action on the part of the union would also explain the delay on the part of the employees in complaining about the union misrepresentations, since it would appear to them that all the union had done was to petition for the promised election.

---

[7] When the Trial Examiner received the employee letter and entered it upon his own motion, and as a Trial Examiner's exhibit as "relevant evidence" under Section 102.35 (d) of the *N.L.R.B. Rules and Regulations*, he was under a duty to exercise his authority under Section 102.35 (h) and reopen the hearing to determine the truth or falsity of the letter, rather than dismissing it as being of "doubtful weight." Section 102.39 provides for the application of Rule 59(a) of the Federal Rules of Civil Procedure, which allows for trial court re-opening of hearings upon the Court's own initiative, which right should be exercised for the interests of justice. *See* 3 BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE, §1302 (1958). Surely the interests of justice required the Trial Examiner to reopen the hearing to make a full examination of the newly discovered evidence which he deemed of sufficient importance to enter upon his own motion as a Trial Examiner's exhibit. This is especially so in light of the new view such evidence cast upon the basis of the union's claim of majority status—the authorization cards.

The Petitioner submits that under the standards established by this Court in *Gissel*, and even as subsequently applied by the Board[8] clearly invalidate a number of authorization cards in the instant case and, therefore, preclude the issuance of a bargaining order. The Petitioner submits that the decision of the Board to the contrary, which decision was enforced by the Circuit Court, is in clear conflict with the decision of this Court in *Gissel* and serves as an ample reason for granting the Petition in the instant case.

V.

The decision of the Circuit Court enforcing the bargaining order requested by the Board in the instant case even though three years had elapsed since the signing of the authorization cards and the commission of the alleged unfair labor practices, is both inappropriate and in conflict with decisions of the United States Court of Appeals for the Fifth Circuit and the Sixth Circuit.

The Petitioner submits that the prime consideration in the instant case, as in any case under the National Labor Relations Act, must be the right of the employees to indicate whether or not they actually wish to be represented by a union for collective bargaining purposes. *See* 29 U.S.C. § 157 (1965). However, in the January 16, 1967 election the employees voted 15 to 10 against the union as a bargaining representative. Yet, the Board has concluded that this vote might have been influenced by unfair labor practices on the part of the employer and has entered a bargaining order as a remedy. The difficulty with this type of remedy has previously been characterized as follows:

> To punish the *employer* for his misdeeds, the Board saddles the employees with an exclusive bargaining

[8] *See Marie Phillips, Inc.*, 178 N.L.R.B. No. 53, 72 L.R.R.M. 1103, 1105 (1969).

> agent which the employees have never chosen by a secret ballot. The employees are presumably innocent of any wrong doing themselves, but they must sacrifice their protected right to a secret ballot as punishment for the employer's violations. *See* Swigert, *Bargaining Orders Based on Cards after Loss of Election,* 70 Lab. Rel. Rep. 139, 140 (1969).

Secondly, and more importantly, there is little justification for concluding that unfair labor practices that occurred some three years into the past still preclude the holding of a fair secret ballot election at the present time. *See N.L.R.B.* v. *American Cable Systems, Inc.*, 427 F. 2d 446 (5th Cir. 1970), *cert. denied* — U. S. —, 75 L.R.R.M 2810 (1970) As stated by Circuit Judge Goldberg in the *American Cable Systems* case

> *Gissel* does not apply a *nunc pro tunc* principle, giving the then sins of the company a now application. It requires contemporaneity—a present view, albeit with a historical prospective. Industrial democracy should be allowed to work its will if the present conditions are sufficiently septic for an election.
>
> * * *
>
> Since *Gissel* teaches us that authorization cards are not as trustworthy as ballots, all concerned must be particularly careful lest the principles of majoritarianism in union representation be unnecessarily frustrated by the cavalier use of bargaining orders. *See* 427 F. 2d at 449.

Thirdly, and just as important, it is not at all clear that the authorization cards in the instant case retained any validity due to the "protracted period of time that has passed since the time of the signing of the cards." *See Clarks Gamble Corp.* v. *N.L.R.B.*, 407 F. 2d 199, 201 (6th Cir. 1969).[9] For these reasons, the Petitioner

---

[9] The Clarks Gamble case was vacated by this Court for reconsideration in light of the *Gissel* case. *See* 396 U.S. 23 (1969). Upon re-

submits that a new election, rather than a bargaining order, is more appropriate in the instant case.

In a similar factual situation to that found in the instant case, wherein the company did not engage in an aggressive or planned campaign against the union, it was determined that, due to the fact that two years had passed since the union had obtained an authorization card majority, that a new election should be held instead of the issuance of a bargaining order. *See N.L.R.B.* v. *Flomatic Corp.*, 347 F. 2d 74, 78-80 (2d Cir. 1965). The Petitioner submits that the same conclusion is compelled in the instant case since three years has transpired since the union allegedly obtained a card majority. Furthermore, the Petitioner submits that the failure of the Circuit Court in the instant case to consider that fact is in direct conflict with the decisions of the United States Court of Appeals for the Fifth Circuit in *N.L.R.B.* v. *American Cable Systems, Inc., supra,* and the United States Court of Appeals for the Sixth Circuit in *Clark's Gamble Corp.* v. *N.L.R.B., supra.* The Petitioner submits that this conflict among the Circuit Courts as to whether or not a bargaining order is appropriate after a substantial amount of time has passed since either the initial signing of the authorization cards, or since the commission of the alleged unfair labor practices, presents a sufficient reason for granting of the Petition in the instant case so that this Court may resolve the conflict between the circuits as well as address itself to these important bargaining order considerations.

---

mand, the Circuit Court emphasized that the protracted period of time that had taken place since the signing of the cards was not due to any procrastination on the part of the company, but rather, was due to the Board's processes, and the Court remanded the case to the Board for reconsideration. *See* 422 F.2d 845 (6th Cir. 1970). The Board then appealed that decision to this Court and certiorari was denied. *See* — U.S. —, 75 LRRM 2416 (1970).

VI.

The decision of the Circuit Court to enforce the bargaining order requested by the Board in the instant case is in direct conflict with a recent report issued by the United States Senate Committee on the Judiciary regarding the power of the Board to issue bargaining orders under the Taft-Hartley Act.

After this Court approved of the use of bargaining orders based upon authorization cards in *N.L.R.B.* v. *Gissel Packing Co.*, 395 U. S. 575, 600 (1969), a number of Circuit Courts followed the lead of this Court and concluded that bargaining orders based upon authorization cards are properly within the power of the Board. *See e.g., N.L.R.B.* v. *Southbay Daily Breeze*, 415 F. 2d 360 (9th Cir. 1969); *Crystyniak* v. *N.L.R.B.*, 415 F 2d 125 (3d Cir. 1969); *Amalgamated Clothing Workers* v. *N.L.R.B.*, 420 F. 2d 1296 (D.C. Cir. 1969). However, this last year the United States Senate Committee on the Judiciary Subcommittee on Separation of Powers issued a report on Congressional Oversight of Administrative Agencies dealing specifically with the National Labor Relations Board which conflicted with this Court's decision in *Gissel* regarding the propriety of bargaining orders.

The Senate Subcommittee indicated that when Congress eliminated the words "other suitable method" from Section 9(c) of the Act leaving the provision "election by secret ballot" that it was the intent of Congress to eliminate the power of the Board to issue bargaining orders based upon authorization cards. *See* STAFF OF SENATE COMM. ON THE JUDICIARY, 91st CONG., 1st SESS., SUBCOMM. REPORT ON SEPARATION OF POWERS (N.L.R.B.) at 9 (Comm. Print 1970). The subcommittee report strongly affirmed that it was the intent of the Congress to "rely upon the election process as the only authorized method of determining the

wishes of employees on the question of organization." The subcommittee also stated that the persistent use of authorization cards to replace the election process is "a violation of the Board's obligation to enforce the terms and intent of the statutes." *Id.*

The Senate Subcommittee also specifically considered this Court's decision in *Gissel* and concluded that this Court's interpretation of the Act was "by no means a mandatory reading of the Act," and that the reasoning of this Court in *Gissel* "wholly ignores the fact that the whole point of the secret ballot is to permit a public stance which differs from one's conduct in the ballot box." *Id.* at 24-25.

It has been this reliance upon an "admittedly inferior" process, *see N.L.R.B.* v. *Gissel Packing Co.*, 395 U. S. 575, 603 (1969), that has bothered commentators in the field of labor relations for some time. As noted by one practitioner in the field:

> The pressures which induce an employee to sign a card lose their effect in the secret voting booth. That is where the employee registers his true choice. . . . This laboratory must be kept so sanitary that the employer is scarcely permitted to open his mouth during the 24 hours before the polls open. This is so the secret ballot will truly reflect the honest and uncoerced choice of the employees. No one can quarrel with this concept. The card check, on the other hand, is about as scientific as a poker game at Caesar's Palace in Las Vegas. *See* Swigert, *Bargaining Orders Based on Cards After Loss of Election*, 70 Lab. Rel. Rep., 139, 140-41 (1969).[10]

See also N.L.R.B. v. *Hannford Bros. Co.*, 261 F. 2d 638 (1st Cir. 1958).

The Petitioner submits that the sentiments expressed

[10] This article is now reported at 1969 Labor Relations Year Book 359 (B.N.A. 1970).

by the Senate Subcommittee indicating that the Board does not have the power or authority to issue a bargaining order based upon authorization cards in place of a secret ballot election is in direct conflict with the decision of the Circuit Court enforcing the Board's order in the instant case. Even though this Court may consider the matter of the Board's power in this area to be settled, the petitioner notes that at least one subcommittee of the United States Senate does not agree and the Petitioner submits that this is ample reason for this Court to grant the petition in the instant case and consider the contentions of the Senate Subcommittee.

VII.

The decision of the Trial Examiner and Board departed substantially from accepted judicial procedure and the Circuit Court, in enforcing the order sought by the Board, departed from the standards established by this Court in Universal Camera Corp v. N.L.R.B., 340 U.S. 474 (1951).

The complaint before the Board charged the president of the company with making reference to unions in his first speech to employees, but the company president denied making any reference to unions in the first speech (A.65). Besides the fact that it is not at all clear that the company had even received the union's demand for recognition by the time of the first meeting, the Petitioner points out that the Trial Examiner and the Board have accepted the complaint allegations as fact without resolving a very important conflict in record testimony.

The Trial Examiner did not credit the company president's denial of the statements attributed to him during the first speech except insofar as "it is corroborated by creditable witnesses." (A.8, n.4). Thus, since the company shop foreman corroborated the company presi-

dent's denial of any mention of the unions at the first meeting (A.73), and since the company shop foreman was nowhere discredited by the Trial Examiner in any of his findings, it naturally follows that the Trial Examiner credited the version of the first speech described by the company president. However, the Trial Examiner nevertheless concluded that the company had committed an unfair labor practice by placing reliance upon the version of the speech described by witnesses for the General Counsel. The Petitioner submits that the instant case thus provides an example of a substantial departure from established judicial procedure in a number of specifics.

In the first place, the Trial Examiner, by failing to discredit the version of the first speech described by the company president, presented a situation wherein both versions of the first speech, even though conflicting, were credited by the Trial Examiner. Then, without more, the Trial Examiner chose one of the two credited versions without ever explaining how he resolved the conflict. While Professor Davis has stated that the evidentiary standards employed by the Board and its Trial Examiners are "unascertainable," *see* 2 DAVIS ADMINISTRATIVE LAW § 14.07 (1958), even the Board has acknowledged that a Trial Examiner may not make a conclusion that conflicts with testimony which he has credited. *See Teamsters, Chauffeurs and Helper's Union Local 279*, 140 N.L.R.B. 164, 165-66 (1962). However, in the instant case the Trial Examiner credited the testimony of the company witnesses and then reached a conclusion which was not supported by this conflicting testimony.

In the second place, the Trial Examiner has a fundamental duty to resolve issues of credibility and conflicting testimony. *See N.L.R.B.* v. *Buitoni Foods Corp.*,

298 F. 2d 169, 171 (3d Cir. 1962). Without having the benefit of the Trial Examiner's resolutions on conflicting testimony or credibility resolutions that would support his conclusions, the Board had no substantial evidence to support the conclusion that the company had violated the Act by the first speech and should have rejected the Trial Examiner's conclusion. *See Garment Workers Local 66*, 134 NLRB 879, 880 (1961); *Funkhouser Mills*, 132 NLRB 245, 247 (1961).

Thirdly, Section 8(c) of the Administrative Procedure Act requires the Trial Examiner to include in his decision a statement of findings and conclusions, and the reasons or basis therefore, on all of the material issues of fact, law or discretion presented on the record. *See* 5 U.S.C. § 557 (c) (1967). Similarly, Section 102.45 of the Board's Rules and Regulations provides that the Trial Examiner's report shall contain findings of fact, conclusions and the reasons or basis therefore, upon all material issues of fact, law or discretion presented on the record." *See* 29 C.F.R. § 102.45 (1968).

The Petitioner submits that the Trial Examiner's conclusion that the company violated the Act by virtue of the first speech the company president gave to employees is not supported by his credibility resolutions, and that he may not make a finding of fact upon an unresolved and conflicting record. The petitioner submits that the Board should have resolved this conflict or remanded the case to the Trial Examiner and that both the Board and the Circuit Court departed from, or approved of, this substantial departure from established judicial procedure in the instant case. The Petitioner submits that this is a significant reason for the granting of the petition in the instant case and urges the Court to grant the petition herein so that the Trial Examiner's departure from established judicial precedent may be examined.

VIII.

The decision of the Circuit Court regarding the speeches in the instant case is in direct conflict with First Amendment rights and the provisions of Section 8(c) of the Labor Management Relations Act.

The lower Court, in a somewhat unclear opinion, stated that the comments made by the employer to his employees on two separate occasions "went beyond prediction or expression of opinion and violated Section 8(a)(1) of the Act." (App. A at 43). The Petitioner submits that it is unclear as to which predictive comments of the employer violate the Act and constitute unfair labor practices since the Courts do not specify specific portions of the speeches but simply outlined the alleged content of the speeches and then concluded that the employer had engaged in an unfair labor practice. This difficulty has increased by the fact that the Board did not unanimously conclude that the second speech of the employer constituted an unfair labor practice. (App. B at 47).

The Petitioner submits that the conclusion of the Circuit Court in this case conflicts with many pre-*Gissel* decisions regarding the freedom of speech allowed to employers under both the first amendment and Section 8(c) of the Act. *See e.g. N.L.R.B.* v. *Cactus Petroleum, Inc.*, 355 F. 2d 755, 760 (5th Cir. 1966); *Southwire Co.* v. *N.L.R.B.*, 383 F. 2d 235, 241 (5th Cir. 1967); *N.L.R.B.* v. *T. R. W. Semiconductors, Inc.*, 385 F. 2d 753, 755 (9th Cir. 1967); *N.L.R.B.* v. *Virginia Electric Power Co.*, 314 U. S. 469 (1941); *Thomas* v. *Collins*, 323 U. S. 516 (1945); *N.L.R.B.* v. *Grand Foundries, Inc.*, 362 F. 2d 702, 708 (8th Cir. 1966); *Linn v. Plant Guard Workers*, 383 U. S. 53, 62 (1966); *N.L.R.B.* v. *River Togs, Inc.*, 382 F. 2d 198, 202 (2d Cir. 1967); *P. R. Mallory & Co.* v. *N.L.R.B.*, 389 F 2d 704, 707 (7th Cir 1967); *N.L.R.B.* v. *Rohlen*, 385 F. 2d 52

(7th Cir. 1967); *Fort Smith Broadcasting Co.* v. *N.L.R.B.*, 341 F. 2d 874, 879 (8th Cir. 1965); *N.L.R.B.* v. *Howard Quaries, Inc.*, 362 F. 2d 236, 240 (8th Cir. 1966); *N.L.R.B.* v. *Colvert Dairy Products Co.*, 317 F. 2d 44, 46 (10th Cir. 1963); *N.L.R.B.* v. *W. J. Burns International Detective Agency, Inc.*, 346 F. 2d 897, 903 (8th Cir. 1965); *N.L.R.B.* v. *Hawthorne Co.*, 404 F. 2d 1205, 1214 (8th Cir. 1969); *Don the Beechcomber* v. *N.L.R.B.*, 390 F. 2d 344, 345 (9th Cir. 1968); *N.L.R.B.* v. *Yokell*, 387 F. 2d 751, 756-57 (2d Cir. 1967); *N.L.R.B.* v. *Super-Rex Drugs, Inc.*, 341 F. 2d 747 (6th Cir. 1965).

Chief Justice Warren stated in *N.L.R.B.* v. *Gissel Packing Co.*, 395 U. S. 575 (1969) that:

> . . . an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have upon his company. *See* 395 U. S. at 618.

Thus, it would not appear that this Court did not in any way foreclose the employer's right under either the first amendment or Section 8(c) of the Act to communicate his views about unionism and to even indicate what he thought the precise effects of unionism on his operation might be in the future. However, the Petitioner draws the Court's attention to the Senate Subcommittee Report referred to in the immediately preceding argument and the reaction of that Senate Subcommittee to the Board's attitude about the width of the first amendment and Section 8(c) rights of the employer. That report concluded generally that the Board "has thwarted congressional will" in many instances and that the Board was specifically misapplying congressional intent insofar as Section 8(c)

of the Act was concerned by stating that:

> One of the most vexing legal problems of pre-election conduct involves the issue of what kind of speech constitutes an unfair labor practice or sufficiently inhibits free choice to upset an election. Because of section 8 (c) speech alone cannot be the basis of an unfair labor practice charge unless it coerces or promises some benefit. What is coercive speech, however, is again a question on which reasonable men can differ in particular cases. But one thing is clear and that is that the present Board has initiated a "trend * * * toward ever increasing restrictions on employer's speech * * *," *N.L.R.B.* v. *Golub Corp.*, 388 F. 2d 921, 926 (1967), and has gone to the limit and beyond in finding a coercive impact in isolated and relative innocuous remarks by employers. The most significant line of cases here involves the Board's attempts to find "threats" in predictive statements. In *Golub*, for instance, the employer had merely pointed out to the employees what economic effects were possible results of agressive unionism—unemployment, etc.—and that a collective agreement with rigid rules might preclude individual discretionary benefits. That such consequences are in fact quite plausible results of unionization was of little import to the Board. More significantly, the Board failed to take into account the very real disparity and ability to engage in campaign redirect when it formulated severe restrictions on employer predictions. The union is always free to promise increase benefits as a result of its efforts. The only effective response the employer has is the one used in *Golub*. To prohibit such a response as either to deny an elementary fact of economics and collective bargaining or to conceal from employees an important issue on which their vote might turn. *See* Report, *supra*, at 7-8 (footnotes omitted).

The Petitioner submits that the Board has continued this type of an application of Section 8(c) in the instant case and that the petition in the instant case

should be granted so that the Board's actions may be reexamined by this Court.

In addition, the Petitioner notes that the decision of the Circuit Court in the instant case which does not indicate that any great care was given to the first amendment or Section 8(c) rights of the employer is in direct conflict with decisions of the United States Court of Appeals for the Second Circuit both before and after this Court's decision in *Gissel.* See e.g. *N.L.R.B.* v. *River Togs, Inc.*, 382 F. 2d 198, 202 (2d Cir. 1967); *N.L.R.B.* v. *General Stencils, Inc.*, — F. 2d —, 76 L.R.R.M. 2288 (2d Cir. 1971). For all of these reasons, the Petitioner respectfully urges this Court to grant the petition in the instant case so that the decision of the Circuit Court may be re-examined in light of the standard this Court established in *Gissel* regarding employer free speech, which the Petitioner submits were either misapplied or not applied by the Circuit Court in the instant case.

CONCLUSION

For all of the foregoing reasons, the Petitioner respectfully requests that its petition for writ of certiorari be granted.

Respectfully submitted,

NOLL MOTORS, INC., Petitioner
By: NELSON, HARDING, MARCHETTI, LEONARD & TATE
RICHARD P. NELSON &
WILLIAM A. HARDING
300 N.S.E.A. Building
P. O. Box 82028
Lincoln, Nebraska 68501
and
COLLINS & GRIMM
DAVID COLLINS
Macon, Missouri 63552
Attorneys for Petitioner

Dated at Lincoln, Nebraska
this 10th day of February, 1971.

APPENDIX A

In The

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 19,572

National Labor Relations Board, Petitioner,

v.

Noll Motors, Inc., Respondent.

On Application for Enforcement of an Order of the National Labor Relations Board.

[November 4, 1970.]

Before MATTHES, Chief Judge; HEANEY, Circuit Judge; VAN PELT, Senior District Judge.

HEANEY, Circuit Judge.

This case is before us, for the second time upon the petition of the National Labor Relations Board for enforcement of its order against Noll Motors, Inc. When it was first here, we remanded for reconsideration by the Board in light of *N.L.R.B.* v. *Gissel Packing Company*, 395 U.S. 575 (1969). The Board's original decision is reported at 168 N.L.R.B. No. 137, 67 LRRM 1174 (1967); its supplemental decision appears at 180 N.L.R.B. No. 60, 73 LRRM 1036 (1969).

Noll challenges both the validity of the finding that it committed a section 8(a)(1) violation, and the propriety of the order requiring it to bargain with the Union.

THE 8(a)(1) VIOLATION

Our review of the record and briefs satisfies us that substantial evidence on the record as a whole supports the Board's finding that Noll violated Section 8(a)(1) of the National Labor Relations Act.

The Union initiated an organizing campaign in November of 1966. It secured valid authorization cards from fifteen of Noll's twenty-six employees and requested recognition by registered letter on November 23, 1966. Noll refused to accept the letter. On November 28, the Union filed a petition for a representation election. One week later, the Union made additional requests for recognition by regular mail and night letter. On December 5, the president of Noll called the employees together. He discussed production problems with them, and called their attention to other plants in the community where employees had been laid off following their vote to unionize. He reminded his employees of prior unsuccessful attempts to unionize his company and stated that the employees after going out on strike, had obtained nothing. He asserted that if the Union succeeded this time, he would have to operate the shop on a production basis, and that he didn't know whether all his men could make it on that basis. Finally, he singled out three men and inquired of them why they were supporting the Union and what their complaints were. He asked one of the three if he remembered the last strike, whether he remembered that the employees got nothing and that he, the president, wound up paying the grocery bill for them to return

to work. The employees were called together for a second time near the end of December, at which meeting a prepared speech was read to them. It stated in part:

> "No doubt, we have made some mistakes here at this Company but feel we have done our best. I simply do not see how bringing in some outsider is going to help us solve any of our problems—in fact it can be a trouble maker. As you know, the Union is just that—trouble in the past. You don't hear of strikes in nonunion plants, do you? I don't believe you want to invite the Union in here and put yourself in a position where someone in St. Louis can say 'hit the streets,' do you? Some of you might say—well, even if the Union management in St. Louis did say, 'hit the streets' I wouldn't do it. Maybe you wouldn't but the Union is always telling you that you ought to do this and so because everyone else is doing it—and I suppose that could include striking and walking the picket line whether or not you could meet your house, car or tax, and mortgage payments. This sort of going along with the crowd talk doesn't put money in your pay envelope. I'm sure none of us want the Adolph Hitler group thinking in this country. * * *
>
> * * * * * * *
>
> "Business and people are already leaving Moberly and Randolph County. We have less population now then we had here 20 years ago. The union over at the shoe factory alone, I am told took over 600 jobs out of town—and I wish we had the service and sales of those people in town right now. I don't know what the situation will be with MFA Packing plant at Macon as the Union won an election over there but MFA closed the plant. Whether it was because of the Union, I don't know. I certainly hope the people over here will not foul up the town so much with the Union. We could use big business to help our young people in this area—and frankly to provide more work for us all. I am worried about the Bersted plant.

"While I want to make it perfectly clear that you have every right to vote union or not as you choose, I hope you will not bring in these potential friction makers into our group. I certainly do not feel guilty in the least in asking you to vote No—meaning no union. A year from now or later if you are not satisfied you can bring the union in—but once in the unions are not easy to get out."

Subsequent to the speech, Noll's shop manager indicated to one employee that he might be able to help him obtain a used car, and to another that he might be able to help him secure a requested work assignment if the Union lost the election.

Clearly, the president's statements, the interrogations and the manager's statements considered as a whole justified the Board's findings of coercion and restraint. The statements went beyond prediction or expression of opinion, and violated Section 8(a)(1) of the Act. See, *H. L. Meyer Company* v. *N.L.R.B.*, 426 F.2d 1090 (8th Cir. 1970); *McGraw-Edison Company* v. *N.L.R.B.*, 419 F.2d 67 (8th Cir. 1969); *N.L.R.B.* v. *Louisiana Manufacturing Company*, 374 F.2d 696 (8th Cir. 1967). Compare, *N.L.R.B.* v. *Howard Quaries, Inc.*, 362 F.2d 236 (8th Cir. 1966); *Gem International, Inc.* v. *N.L.R.B.*, 321 F.2d 626 (8th Cir. 1963).

The teachings of the Supreme Court in *N.L.R.B.* v. *Gissel Packing Company, supra*, would seem to dictate the Board's decision:

"* * * [A]n employeer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the predic-

> tion must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. * * * If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that '[c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof.' 397 F.2d 157, 160. As stated elsewhere, an employer is free only to tell 'what he reasonably believes will be the likely economic consequences of unionization that are outside his control,' and not 'threats of economic reprisal to be taken solely on his own volition.' * * *"

Id. at 618, 619.

Here, the employer's prediction was not carefully phrased to demonstrate probable consequences beyond his control nor to convey a management decision already arrived at to close the plant in case of unionization. It was rather phrased to predict that unionization would inevitably cause the plant to close, throwing employees out of work regardless of the economic realities.

THE REMEDY

There is substantial evidence to support the Board's finding that the Union represented a majority of the employees on November 23, and that Noll refused in

bad faith to recognize and bargain with the Union on request.

The company's reaction to the Union's request for recognition was to engage in a series of unfair labor practices which the Board found had a tendency to undermine the majority strength and impede the election process. Under such circumstances, the Board's decision that "the purposes of the Act [could] be better effectuated, and the employees' rights better protected by reliance on the employees' desires as expressed by signed authorization cards than on the results of a rerun election" was an appropriate one. *N.L.R.B.* v. *Gissel Packing Company, supra; N.L.R.B.* v. *Marsellus Vault & Sales, Inc.*, No. 930, . . . F.2d . . . (2nd Cir. 1970).

The Board's petition for enforcement is granted.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

SUPPLEMENTAL DECISION AND ORDER OF NATIONAL LABOR RELATIONS BOARD

On December 27, 1967, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] finding that Respondent had committed violations of the National Labor Relations Act, as amended, within the meaning of Section 8(a)(1) and (5), and ordering the Respondent cease and desist therefrom and take certain affirmative action, including, *inter alia*, that Respondent bargain with the Union. Thereafter, the Board filed a petition for enforcement of the Order with the United States Court of Appeals for the Eighth Circuit. On June 16, 1969, the Supreme Court of the United States issued its opinion in *N.L.R.B.* v. *Gissel Packing Company*, 395 U.S. 575, in which it laid down certain guidelines relative to the propriety of finding violations of Section 8(a)(5) and issuing orders to bargain upon such violation or violations of other sections of the Act.

After the Supreme Court's decision in *Gissel*, and while the Board's application for enforcement of its order was pending before the United States Court of Appeals for the Eighth Circuit, the Board moved the court for an order remanding the case to the Board for reconsideration in the light of *Gissel*, and on August 13, 1969, the court granted the Board's motion. On August 25, 1969, the Board informed the parties that the Board would reconsider its 8(a)(5) finding and the bargaining order in this case in the light of *Gissel*, and invited the parties to file statements of position with respect to

[1] 168 NLRB No. 137.

the application of *Gissel* to this proceeding. Such statements have been filed by the Respondent,[2] the Charging Party, and the General Counsel.

The Board[3] has again reviewed the entire record including the statements of position and, having reconsidered the matter, affirms its original finding and order for the reasons stated below.

In its original decision the Board found, in agreement with the Trial Examiner, that the Respondent violated Section 8(a)(1) by interrogation, threats, and promises of benefit, in that the Respondent called a meeting of its employees during which Company President Noll questioned them individually about the nature of their complaints and as to their reasons for wanting a union, and stated that if the Union "got in," he would have to operate on a strictly production basis and he was sure that all the employees could not make out on such an arrangement; thereafter, another employee meeting was held at which Shop Foreman Hawkins read a speech prepared by Noll, which stated in part that unions make trouble, caused strikes, and the Union could call a strike whether or not employees could meet their house, car or tax and mortgage payments; that unions elsewhere caused loss of jobs, and that a plant where the Union had won an election closed, whether it closed because of the Union, he did not know;[4] and during the

[2] The Respondent also filed a petition for oral argument. Respondent's request for oral argument is hereby denied, since the record and statements of position adequately present the positions of the parties.

[3] Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

[4] Member Zagoria did not adopt the Trial Examiner's conclusion that Noll's speech read by Hawkins, as quoted in the Trial Examiner's Decision, violated Section 8(a)(1) of the Act or interfered with the election. However, he does agree with his colleagues that a bargaining order is appropriate in this case.

period between the two meetings, the garage manager promised two employees "maybe he could help them get what they wnated" if the Union did not win the election.

With respect to the Section 8(a)(5) allegation, the Board affirmed the Trial Examiner's finding that the Respondent's refusal to bargain with the Union which represented a majority of Respondent's employees in a unit stipulated to be appropriate, when viewed against its contemporaneous 8(a)(1) conduct, was not motivated by a good-faith doubt of the Union's majority, and that, therefore, the Respondent had committed a violation of Section 8(a)(5) and (1) for which a bargaining order remedy was appropriate; that the Respondent's 8(a)(1) conduct interfered with the election; and his recommendation that the election; and his recommendation that the election be set aside.

In view of the Supreme Court's opinion in *Gissel*, we do not reaffirm our earlier finding which predicated the Respondent's violation of Section 8(a)(5) on the absence of a good-faith doubt of the Union's majority status. We find, rather, that by refusing to bargain with the Union and by engaging in a series of unfair labor practices which were calculated and tended to undermine the Union's majority status, the Respondent violated Section 8(a)(5) and (1). The unfair labor practices were of such a nature as to render doubtful that the coercive effects of Respondent's unfair labor practices could be eliminated by traditional remedies, so as to ensure a fair election. We find, under these circumstances, the purposes of the Act can better be effectuated, and employee rights better protected, by reliance on the employees' desires as expressed by signed authorization cards than on the results of a rerun election. Therefore, the bargaining order previously issued

is appropriate to remedy the Respondent's violations of Section 8(a)(5), as well as to remedy the other unfair labor practices found.

Accordingly, we hereby reaffirm the Decision and Order heretofore issued in this case.

Dated, Washington, D.C. Dec. 16, 1969

Frank W. McCulloch, Chairman
John H. Fanning, Member
Sam Zagoria, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

APPENDIX C

DECISION AND ORDER OF NATIONAL LABOR RELATIONS BOARD

On October 26, 1967, Trial Examiner Thomas F. Maher issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, and also finding that the Respondent had interfered with the election and recommending that it be set aside, as set forth in the attached Trial Examiner's Decision.[1] Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the Respondent's exceptions and brief, and the entire record in these cases, and hereby adopts the findings, conclusions,[2] and recommendations of the Trial Examiner.[3]

---

[1] On October 30, 1967, the Trial Examiner issued an erratum stating that Appendix A was inadvertently omitted from his Decision. The Appendix is accordingly attached to the Trial Examiner's Decision.

[2] Member Zagoria would not adopt the Trial Examiner's conclusions that Noll's speech read by Hawkins, as quoted in the Trial Examiner's Decision, violated Section 8(a)(1) of the Act or interfered with the election.

[3] In view of our finding that Respondent violated Section 8(a)(5) of the Act, we shall dismiss the petition in Case No. 17-RC-5251 and vacate all proceedings held in connection therewith.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Noll Motors, Inc., Moberly, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Reccommended Order.

IT IS FURTHER ORDERED that the petition in Case No. 17-RC-5251 be, and it hereby is, dismissed, and all proceedings held in connection therewith be, and they hereby are, vacated.

Dated, Washington, D. C. Dec. 27, 1967.

[Subscription Omitted in Printing]

APPENDIX D

TRIAL EXAMINER'S DECISION

Statement of the Case

THOMAS F. MAHER, Trial Examiner: Upon a charge and an amendment thereto filed on January 23 and March 28, 1967, respectively, by District 9, International Association of Machinists and Aerospace Workers, AFL-CIO, herein called the Union, the Regional Director for Region 17 of the National Labor Relations Board, herein called the Board, on behalf of the General Counsel of the Board, issued a Complaint on March 30, 1967, against Noll Motors, Inc., Respondent herein, alleging violations of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (29 U.S.C., Sec. 151 *et seq.*), herein called the Act. Previously, on March 16, 1967, the Regional Director issued his Order consolidating Case No. 17-RC-5251 with the instant case and directing a hearing on objections filed by the Union in that case wherein an election had been held on January 16, 1967, among Respondent's employees. As a consequence of the Regional Director's Order of Consolidation the Complaint issued herein is deemed to constitute a Consolidated Complaint. In its duly filed Answer Respondent, while admitting certain allegations of the complaint, denied the commission of any unfair labor practice.

[Subscription Omitted in Printing]

Pursuant to notice a trial was held before me in Moberly, Missouri, where all parties were present, represented, and afforded a full opportunity to be heard, present oral arguments, and to file briefs with me. Briefs were filed by counsel for Respondent and the General Counsel on June 12, 1967.

Meanwhile after the closing of the trial in this matter there was mailed to me a handwritten document dated May 5, 1967, bearing what purports to me the penciled signatures of thirteen of Respondent's employees who had voted in the election. Thereon was stated their belief that they had signed union authorization cards prior to the election only as a formality to obtain the election and it further stated their desire to have "no part of the Union." On May 12, 1967, I issued an Order to Show Cause directed to the incorporation of this document into the record and after fully considering General Counsel's opposition to such incorporation I now direct that the handwritten document referred to above be incorporated into the record of this proceeding as Trial Examiner's Exhibits 3 and 4,[1] to be considered further hereafter (*infra*, p. 11).

Upon consideration of the entire record, including the briefs of the parties, the subsequent submissions by counsel and General Counsel's opposition thereto, and specifically upon my observation of each witness appearing before me,[2] I make the following:

Findings of Fact and Conclusions of Law

I. The business of the Respondent

Noll Motors, Inc., is a Missouri corporation with its principal place of business at Moberly, Missouri, where

[1] These documents are erroneously referred to in my Order to Show cause as Trial Examiner's Exhibits 1 and 2. This error is hereby corrected.

[2] *Bishop and Malco, Inc.*, 159 NLRB No. 106.

it is engaged in automotive retail sales and services. During the year 1966 its sales and services exceeded $500,000 and it purchased automobiles and automotive products valued in excess of $50,000 from suppliers located outside the State of Missouri.

Upon the foregoing stipulated facts Respondent concedes and I conclude and find that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The labor organization involved

It is conceded and I conclude and find that District No. 9, International Association of Machinists and Aerospace Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The issues

1. Threats, interrogation and promises of benefit as interference, restraint and coercion.

2. Good faith elements of a refusal to bargain.

3. Authorization cards as evidence of majority status.

4. Effectiveness of subsequent disavowal of union adherence.

IV. The unfair labor practices

A. *Interference, restraint and coercion*

1. Sequence of events

When the Union's organizing efforts among Respondent's employees resulted in the signing of cards by them authorizing it to represent them as their bargaining representative a letter dated November 23, 1966, under the

signature of James Redman, the Union's Business Representative, was mailed to Respondent at its Moberly, Missouri, address. It read as follows:

> This is to advise that a majority of your garage employees such as service and maintenance employees have authorized and designated District No. 9, International Association of Machinists and Aerospace Workers, AFL-CIO, as their bargaining representative in all matters regarding wages, hours of work, working conditions, and other conditions of employment.
>
> Should there be any good faith doubt on your part of the Union's majority status, please advise and the Union will immediately submit proof of our majority status to some mutually agreeable impartial thirt party, such as a Minister, a Rabbi, a Priest, or a member of the Federal Mediation and Conciliation Service for the purpose of asiertaining same.
>
> This will serve as the Union's request that the Company recognize and bargain collectively with the Union and negotiate to a conclusion the terms of a collective bargaining agreement regarding all matters pertaining to wages, hours of work, working conditions, and other conditions of employment. Please treat this request for recognition as the majority representative of the employees in said unit as a continuing request; and in the interim it is expected and requested that all matters remain unchanged unless a mutual understanding has been reached with the Union. We stand ready and willing to meet with your designated representatives at an early date, mutually agreeable to the parties, to conclude such negotiations.
>
> You can reach me at the above address or telephone Olive 2-2100.

This letter was sent, certified mail, return receipt requested, and was enclosed in an envelope bearing the

Union's name and return address. It was returned to the Union on or about November 25 by the Moberly, Missouri Post Office, marked "refused." Because the circumstances surrounding the fate of this item of mail bear significantly upon the issues presented by this case they will be explored at this point.

On or about November 24 James Williams, Respondent's Garage Manager, was informed by a girl in the office that a certified letter had arrived. Williams informed her "we had better wait for Mr. Noll," and the delivery was refused. Thereafter Williams went to the Post Office and informed them, "Mr: Noll will be down when he gets done with all his trouble he can take care of it" While it is undenied that Noll was then personally involved with serious illness in his family and was himself under a physician's care, these being "all his trouble" referred to by Williams, there is no evidence in the record that Respondent's business affairs was in any way curtailed during this period or that were in any way curtailed during this period or that other registered or certified mail, if any, had been refused pending Noll's resumption of full duties.

The Union's original letter of request for recognition having been refused, the Union, on November 30 enclosed a copy of the original letter together with a note to explain that it was being sent because the original had been refused. This letter was sent in a plain envelope by regular mail.[3] While there is no direct evidence that this letter was received, President Noll did testify that he received a letter from the Union as well as a telegram bearing the identical message and sent on December 1. Noll did not reply to the letter but turned it vore to his local attorney, David Collins, telling him as he did so that he did not feel that the Union had

[3] The credited testimony of Union Representative Redman.

enough votes to call an election particularly since 18 years ago the Union had made a similar claim and apparently lost the election at that time.

Thereafter on December 5, Respondent called a meeting of its employees in which Noll spoke. He spoke at some length on the production problems in the shop and then turned his attention to the Union. He mentioned the rumors going about that the Union was attempting to organize the shops in Moberly. He reminded them that "when the Union tried to come in there before that they was out a long time and didn't get nothing,"[4] he described the organized shops in Kansas City as not being paid as well paid as his. He went on to say that if the Union did get in and he was able to "accept" his contract he would then have to operate the shop "on a strictly production basis," and he was sure that all the men could not make out on such an arrangement. Noll then referred the men to the labor situation at the nearby Bersted plant, an electric fan manufacturing establishment, commenting on the unresolved results of an election recently held there.[5] He then proceeded to single out the employees, questioning them individually about the nature of their complaints with the shop. He started with Employee Donald Kroner and asked him why he wanted the Union. He asked the same question of Employees Rogers, Smith and Guil-

---

[4] The account of the meeting is the credited testimony of Employee Roger Smith, corroborated by Employee Luke H. Guilfoyle. President Noll denied saying anything about labor unions. For reasons discussed hereafter (*infra*, p. 7) I do not credit Noll's denial of the conduct or statements attributed to him or his testimony generally except that it is corroborated by credible witnesses, constitutes submissions against Respondent's interest or describes matters solely within his own knowledge.

[5] The records of the Board disclose that a trial in Case Nos. 17-CA-2977 and 17-RC-5212, *McGraw-Edison Co. (Bersted Manufacturing Division)*, was held in January 1967 and that the Trial Examiner's Decision issued on September 11, 1967.

foyle. Others, such as Employee Bill James, he asked "if they remembered the last time they went out on strike, that it involved a long period of time and they never got anything, and he wound up paying the grocery bill for them coming back to work."[6]

Two or three weeks thereafter another employee meeting was held at which Shop Foreman R. D. Hawkins presided in Noll's absence. For this occasion Noll had prepared a speech which Hawkins read to the men. This, it would appear, was substantially a repetition of what Noll had said three weeks previously. A transcript of Noll's speech appears as Appendix A of this Decision and refernece is made to it in its entirety. In his brief to me counsel for the General Counsel refers specifically to certain portions of this speech, claiming such to be evidence of Section 8(a)(1). Thus in outlining for employees the possible consequence to them of selecting the Union Noll's speech read:

> No doubt, we have made some mistakes here at this Company but feel we have done our very best. I simply do not see how bringing in some outsider is going to help us solve any of our problems—in fact it can be a trouble maker.
>
> As you know, the Union is just that—trouble in the past. You don't hear of strikes in non union plants, do you? I don't believe you want to invite the Union in here and put yourself in a position where someone in St. Louis can say "Hit the streets," do you? Some of you might say—well, even if the Union management in St. Louis did say, "Hit the streets" I wouldn't do it. Maybe you wouldn't but the Union is always telling you that you ought to do this and so because everyone else is doing it—and I suppose that could include striking and walking the picket line whether or not you could meet your house, car or tax, and mortgage payments. This sort of go along with the crowd talk doesn't

[6] The credited account of Guilfoyle.

put money in your pay envelope. I'm sure none of us want the Adolph Hitler group thinking in this country.[7]

Appendix A, p. 1

Thereafter, by way of relating business and economics in the area to the possible advent of the Union the speech continued:

> Businesses and people are already leaving Moberly and Randolph County. We have less population now then we had here 20 years ago. The Union over at the Shoe Factory alone, I am told, took over 600 jobs out of town—and I wish we had the service and sales of those people in town right now. I don't know what the situation will be with the MFA Packing plant at Macon as the Union won an election over there but MFA closed the plant. Whether it was because of the Union, I don't know. I certainly hope the people over here will not foul up the town so much with the Union. We could use big business to help hold our young people in this area—and frankly to provide more work for us all. I am worried about the Bersted plant.

Appendix A, p.2

Upon the conclusion of the speech Employee Bellows, a car salesman, spoke up and said that he personally knew Mr. Noll would never sign a contract. While there is nothing in the record to suggest that Bellows spoke as an agent in behalf of Respondent, Shop Foreman Hawkins, who had completed reading Noll's speech, made no comment to Bellows' remarks.

During the period between the two meetings discussed above a conversation occurred between Em-

[7] In quoting the allegedly offending excerpts of Noll's speech I have set forth the text with such preceding in the following portions as I believe properly establishes the context. References to each excerpt are to the appropriate pages of the full text in Appendix A. *infra.*

ployees Kitchen and Robinson and Garage Manager Williams which bears significance to the issues presented here. Thus Marion Kitchen credibly described how he and Billy Robinson were talking about the Union with Williams during a coffee break and at one point Robinson changed the subject and told Williams he would like to be reassigned to work on the shop's front-end alignment machine, in the abscence of the regular operator of the machine. During the same conversation Kitchen mentioned to Williams the possibility of buying a used station wagon. In reply to both men Williams said, "Well, if the Union goes I can't help you fellows. My hands will be tied. If it don't go maybe I can help you fellows and maybe you fellows can get what you want."[8]

2. Conclusions

A review of the foregoing findings is clearly illustrative of conduct and statements proscribed by the Act. Thus President Noll in his two speeches left no doubt in the minds of those who heard him that adherence to the Union would be distinctly detrimental, describing the misfortunes that followed the Union's last efforts

[8] The credited testimony of Employee Kitchen. Williams testified that the conversation took place but denies that he made any promises to the men, stating that he was ismply attempting to avoid making any changes while the union matter was outstanding. Based upon my observations and upon the incongruity of another of Williams' statements I do not credit him except as his testimony is corroborated by credible witnesses, involves information within his peculiar knowledge, or constitutes an admission contrary to Respondent's interest. The other item of testimony which impels me to this conclusion is Williams' testimony with respect to the refused certified letter which bore the return address of the Union. During a period when it was conceded that union rumors were rampant throughout the town and President Noll was aware of other shops being organized Williams was instrumental in refusing the Union's letter. When asked on the stand if he related this letter to union activities he replied, "No." Because I deem such an answer at least unrealistic I am not disposed to credit Williams except as qualified above.

to arrive at an agreement with him, and inferring that in the event he did "accept" a contract then working conditions would deteriorate; that is to say, the men would be working strictly on a production basis which some of them might not be able to make. Citation of authority or detailed analysis are hardly necessary to conclude that these remarks are something entirely different from the freedom of speech guaranteed by Section 8(c) of the Act. On the contrary, it is quite obvious that Noll was delivering to his employees a warning of events to come. I consider this the restraint and coercion contemplated by Section 8(a)(1) of the Act and so conclude and find.

Equally well established is the interrogation of employees, particularly in a context of other unlawful conduct.[9] Accordingly, when, at the December 5 meeting Noll went from man to man asking each why he had joined the Union he was thereby intruding himself into a matter which was clearly none of his business. I would conclude and find that he thereby interfered with restrained and coerced his employees in further violation of Section 8(a)(1).

Similarly, when Noll in his speech related the possible advent of the Union to the business and economic deterioration of the community he was indulging in something more than speculation. What he was telling his employees was that their choice of a union to represent them could well bring about a loss of business to the community, loss of jobs to the residents, and a shunning of the area by out of town employers whose coming might bring them economic advantages. This is clearly a restraint upon the free choice of those who would vote for or against a union and most certainly

[9] *Johnnie's Poultry Co.*, 146 NLRB 770, 775.

constitutes further interference, restraint and coercion.

And finally, to the extent that Garage Manager Williams conditioned a "deal" on a used car or a reassignment to a more favorable job to the failure of the Union to win the election, and this I find that he did, he was thereby promising Employees Kitchen and Robinson benefits. This I conclude and find to be a further interference, restraint and coercion upon them in the exercise of their rights guaranteed by Section 7 of the Act thereby violating Section 8(a)(1).[10]

B. *The refusal to bargain*

It is General Counsel's contention that when the Union requested recognition and bargain Respondent reacted in the manner described above, the Union already represented a majority of the employees in the unit agreed upon as appropriate for the purpose of bargaining. This, it is claimed, can be established by the signed union authorization cards in the Union's possession. Accordingly, it is contended, because the Respondent's subsequent doubt of this claimed majority was not made in good faith, as indicated by its subsequent unlawful conduct, and because the conduct was calculated to destroy the Union's established majority, Respondent thereby refused to bargain with the Union in good faith. Because the existence of this majority is a *sine qua non* for any finding of refusal to bargain an analysis of the evidence upon which it is based it is the first order of business.

Preliminary to such an analysis, however, is the arithmetical determination of what constitutes a majority in this instance, and, with relation to the claim and denial, as to what date such a claim must be established.

---

[10] *M. J. McCarthy Motor Sales Co.*, 135 NLRB 828, 834 enfd. 309 F. 2d 732 (C.A. 7).

1. The request and refusal

A consideration of the findings made above (*supra*, pp. 2-4) demonstrates that on or about November 23, 1966 the Union's first letter of request arrived at Respondent's office and was refused, with the knowledge and consent of Garage Manager Williams. I find it quite unnecessary to belabor this event. On the one hand President Noll was admittedly aware of the Unions organizing efforts among the automotive shops in the community. On the other, the Union's addressed letter was clearly identified for what it was—a letter from the Union. I am not disposed to believe that Respondent operates its business affairs generally in such an inefficient manner as would be suggested by its refusal of registered mail. On the contrary, particularly after reading and rereading this record and the testimony of Noll, Garage Manager Williams and Shop Foreman Hawkins, I am persuaded that the Union's letter was refused only because it was believed to be what it actually was—the Union's request for recognition. Under this circumstance alone I would conclude and find that Respondent thereby manifested an absence of any good faith which might otherwise attach to its doubt of the Union's majority status. This action, plus Respondent's refusal to even reject the request, turning it over to its attorney instead, and the subsequent conduct in which it engaged (which conduct I have found to constitute unlawful interference, restraint and coercion) all satisfy me that an adequate demand for bargaining was made and that the subsequent conduct constitutes a refusal in bad faith.[11] In any event, lest there be any lingering doubt that a demand was made, the record is clear that

[11] *Joy Silk Mills, Inc.*, 85 NLRB 1263, enfd. 185 F. 2d 732 (C.A., D.C.)

the second identical letter and the telegram containing the identical message were both received.

2. The date of request

On November 23, 1966, the Union made its first request; on November 28, 1966, the Union filed its petition for an election in Case No. 17-RC-5251; on November 30 it sent its second letter of request; and on December 1, the telegram containing the request was delivered to Respondent. Quite apart, therefore, from any consideration of the effectiveness of the Union's first request for recognition and bargaining two other requests were admittedly made and stated to be continuing requests, and the filing of the Union's petition for an election may independently be viewed as a continuing request for recognition and bargaining, in and of itself.[12] I therefore conclude and find that any claim of majority established by the Union in an appropriate bargaining unit on and after November 23, 1966, would suffice to establish its majority representative status.

3. The appropriate unit

It is agreed upon by all parties that the following constitutes a unit appropriate for the purposes of collective bargaining:

> All service and maintenance employees of Respondent employed at its Moberly, Missouri, facility, excluding office clerical employees, salesman, professional employees, guards, and supervisors as defined in the Act.

4. The arithmetic

The parties have stipulated that between November

[12] See *Ivy Hill Lithograph Co.*, 121 NLRB 831, 835 fn. 13; *Automotive Supply Co.*, 119 NLRB 1074.

21 and December 10, 1966, there were 26 employees employed in the unit found to be appropriate. Accordingly, to demonstrate its numerical majority the Union must establish that during that period it had been accepted by 14 or more of the employees.

5. The signed authorization cards

During the course of its organizing campaign the Union solicited signatures of employees on cards which bore the following inscription:

> AUTHORIZATION FOR REPRESENTATION
>
> I, the undersigned employee of the
>
> * * * *
>
> hereby authorize the International Association of Machinists AFL-CIO to represent me and, in my behalf, to negotiate and conclude all agreements as to hours of labor, wages, and other conditions of employment.
>
> The full power and authority to act for the undersigned as described herein supersedes any power or authority heretofore given to any person or organization to represent me, and shall remain in full force and effect for one year from date and thereafter, subject to thirty (30) days written notice of my desire to withdraw such power and authority to act for me in the matter referred to herein.

Three cards were signed by employees who credibly attested to their own signatures and to the date on which each signed the card,[13] as follows:

Robert Yancey	Nov. 23
Leon Newby	Nov. 22
Charles Staiger	Dec. 5

[13] Consistent with the discretion vested in me by the Board the witnesses called by the General Counsel were cross-examined fully on *voir dire*, with my permission, as to the circumstances under which they signed the authorization cards. *Bryant Chucking Grinder Company*, 160 NLRB No. 125.

In addition, Union Representative John Morgando credibly testified that he was present at a union meeting on November 22 at which he explained the objectives of the Union to the employees of Respondent who were present. They were told that if a majority of them signed authorization cards the Union would request recognition and bargain in their behalf. Blank card forms were distributed to those present. They filled them out, signed them and returned them to Morgando before the close of the meeting. *Eleven* cards were thus received from the following:

William James	William J. Perkins
Billy L. Robinson	Joseph J. McCallum
Mike McCallum	Marion R. Kitchen
Oscar B. Williams	Roosevelt Oliver, Jr.
Roger Smith	Donald Kroner

Luke H. Guilfoyle

No objection was registered to the authenticity of any of the foregoing cards except Oliver's, whose signature was printed. Employee Roger Smith credibly testified that on the night of the meeting he saw Oliver with a card in his possession and he also saw him turn the card in with those of the other employees. He did not see Oliver fill out the card or sign it. As Morgando has credibly testified that *all* cards distributed were returned to him filled out, and as Smith has testified that Oliver turned his card in I would conclude and find that the card received by Morgando and listed above was filled out and returned by Oliver at the meeting and is valid for all purposes herein.

In addition to the cards collected by Morgando at the November 22 meeting he credibly testified that he personally secured the signatue of Employee *Donald Moore* on his card, on the date indicated, November 30, 1966. In the absence of any objections to the procuring of Moore's authorization and upon Morgando's credited testimony I would conclude and find that this is a valid authorization for all purposes herein.

Two cards were submitted in support of the Union's majority claim which are of questionable validity—the cards of *Robert E. Austin* and *Emil Meachum*. Because it would appear that the Union has been designated by 15 other employees, an amount in excess of that required for a majority, I find it unnecessary to count the *Austin* and *Meachum* cards. However, so that my findings will be complete, I will note that because Emil Meachum could not be located to testify concerning his card it was agreed among the parties that upon the submission of his signed Form W-4, Bureau of Internal Revenue Withholding Exemption Certificate, and my comparison of his signature on that form with the one on his authorization card my determination of the card's authenticity would be accepted as final. I have made a visual comparison of the two signatures and find them to be identical. I accordingly conclude and find that Meachum's card would be valid for all purposes herein.[14]

Robert E. Austin identified his signature on an authorization card and testified that he did not know "most of what he was signing" and that he never read the card. Because testimony of this variety, coming as it does after the fact, partakes of the vice present in

[14] *Heck's Inc.*, 166 NLRB No. 32, fn. 1; *Mnk-Dayton, Inc.*, 166 NLRB No. 79.

all parol evidence proffered to alter the terms of a written document I view it with some reservation. Austin, an intelligent appearing adult, did not impress me as one who would make a practice of signing forms or documents without first reading them, or at least knowing what he was doing. And I would not be inclined to the view that he made an exception in this instance. On the contrary, I would reject his testimony and accept his signed card as a valid designation of the Union.

By way of recapitulation, therefore, and without including the cards of Meachum and Austin, I conclude and find that at all times relevant herein the Union had in its possession 15 valid employee designations when last it requested that Respondent recognize it as the representative of a majority of its 26 employees for the purposes of collective bargaining.

6. Conclusions

In the bargaining unit agreed upon as appropriate I have found that during the period November 21-December 10, 1966, there were 26 eligible employees. To constitute a numerical majority 14 or more would be required to authorize the Union to represent them. On the basis of the findings I have made herein, I conclude and find that during this period 15 employees did so, having signed authorization cards which I have counted as valid, authentic designations.

It is well settled, of course, that an employer may insist upon a Board election as proof of a union's majority, as occurred here; but it is equally well settled that it may not lawfully refuse to bargain under such circumstances when its refusal to accept the union's majority claim is grounded not upon its good faith doubt but rather upon "a rejection of the collective bargaining

principal or by a desire to gain time within which to undermine the Union."[15]

Here Respondent refused even to accept the Union's letter of request and followed this by calling meetings of its employees where it voiced threats of what would occur if the Union were accepted by the employees, and where it questioned them concerning their union membership. Meanwhile it sought by promises of benefit to influence the votes of two of its employees to defeat the Union. Because all of this clearly discloses that the Respondent's refusal to bargain and its doubt of the Union's majority status lacked the good faith required of it, and because I find that Respondent had thus engaged in conduct seeking to undermine the Union's existing majority I conclude and find that its failure and refusal to recognize and bargain with the Union was a violation of Section 8(a)(5) of the Act, and further interference, restraint and coercion in violation of Section 8(a)(1).[16]

7. Subsequent developments

Sometime after the close of the trial there was submitted to me by mail a handwritten document bearing what purports to be the signatures of 14 individuals in Respondent's employ as of May 5, 1967. This document stated in essence that the signers were led to believe that the signing of cards was only a "formality to allow an election." As a consequence, they state, they have decided that they want no part of the Union.

The purpose of the union authorization card is clearly stated on its face (*supra*) and the credited testimony is

---

[15] *Joy Silk Mills, Inc., supra,* at p. 1264. See aso *Winn-Dixie Stores, Inc.,* 143 NLRB 848.

[16] *Mink-Dayton, Inc.,* 166 NLRB No. 79.

ample that all the cards signers were aware of the nature of the cards when they signed them. I am not disposed to consider at this late date evidence of doubtful weigth, to the contrary.[17] Nor am I disposed to consider further the purported desire, as of May 5, 1966, to abandon the Union. My findings and conclusions herein established that as of December 10, 1966, and the two weeks previously, the Union was the bargaining representative of Respondent's employees. That they may have had a change of heart since that time, if indeed they have, does not rebut the presumption of a majority which continues from the date of the Employer's unlawful refusal to bargain.[18] I accordingly reject any suggestion that would impair the obligation of Respondent to bargain with a representative which I find to have been freely designated in November and December 1966.

D. *Objections to the election*

In addition to the foregoing findings and conclusions upon which I shall base my recommendation for a remedy to the unfair labor practices committed I also have before me Objections to the Conduct of Election in Case No. 17-RC-5251, referred to me by the Regional Director for disposition.

A review of the pleadings and related evidence disclosed that the objections raised are substantially identical with the allegations of Section 8(a)(1) in the Complaint. To the extent, therefore, that I have already treated of these allegations and found certain of them to constitute unlawful conduct, as alleged, it would be an undue burden upon the record and reader

[17] *Sagamore Shirt Company*, 153 NLRB 309, 321, enfd. in relevant part, 365 F.2d 898 (C.A., D.C.).

[18] *Sagamore Shirt Company, supra* at p. 321; *Sheridan Creation, Inc.*, 148 NLRB 1503.

to reiterate these findings in a parallel context. Suffice it to say that in the instances of interference, restraint and coercion which I have already found (*supra*, pp. 6-7) it is an *a fortiori* conclusion that such conduct interferes with the exercise of the free choice of voters necessary for an election.[19] Accordingly, I shall recommend that representation election heretofore held in Case No. 17-RC-5251 be set aside.

IV. The effect of the unfair labor practices upon commerce

The activities of Respondent set forth in Section IV, above, occuring in connection with its business operations described in Section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

It has been found that Respondent has violated the Act in certain respects. I will accordingly recommend that an Order issue requiring Respondent to cease and desist therefrom and to take affirmative action which will effectuate the policies of the Act.

RECOMMENDER ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I recommend[20] that Noll Motors, Inc., its of-

[19] *Irving Air Chute, Inc., Marathon Division*, 149 NLRB 627, affd. 350 F. 2d 176 (C.A. 2).

[20] In the event that this Recommended Order be adopted by the Board, the words "RECOMMENDED" shall be deleted from the caption and wherever else it appears thereafter; and for the words "I RECOMMEND" they shall be substituted "THE NATIONAL LABOR RELATIONS BOARD HEREBY ORDERS."

ficers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening its employees with economic reprisals and more arduous working conditions if they selected District No. 9, International Association of Machinists and Aerospace Workers, AFL-CIO, as their bargaining representative.

(b) Promising their employees benefits as an inducement to vote against the aforesaid labor organization in the pending election.

(c) Unlawfully interrogating their employees concerning their union membership and sentiments.

(d) Refusing to bargain with the aforesaid District No. 9, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive representative of employees in the following unit found to be appropriate for the purposes of collective bargaining:

> All service and maintenance employees employed by the employer at its Moberly, Missouri, facility excluding office clerical employees, salesman, professional employees, guards, and supervisors as defined in the Act.

(e) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named labor organization as the exclusive representative of all Respondent's employees in the unit found appropriate and, if an understanding is reached, embody such understandig in a signed agreement.

(b) Post at its Moberly, Missouri facilities, copies of the notice attached hereto as "TXD Appendix B."[21] Copies of said Order, on forms provided by the Regional Director for Region 17, shall after being duly signed by the Respondent, be posted immediately upon receipt thereof in conspicuous places, and be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify the said Regional Director in writing, within 20 days from receipt of the Trial Examiner's Decision what steps it has taken to comply therewith.[22]

Dated at Washington, D. C. Oct. 26, 1967.

/s/ Thomas F. Maher
Trial Examiner

---

[21] In the event that this Recommended Order be adopted by the Board, the words, "A DECISION AND ORDER" shall be substituted for the words, "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of the United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[22] In the event that this Recommended Order be adopted by the Board this provision shall be modified to read: "Notify the said Regional Director in writing within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

TXD APPENDIX B

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT

(AS AMENDED)

we hereby notify our employees that:

WE WILL NOT threaten you that there will be economic reprisals or more arduous working conditions if DISTRICT 9, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, is your bargaining representative.

WE WILL NOT promise you benefits to induce you to vote against the aforesaid union in any pending election.

WE WILL NOT unlawfully question you concerning your union membership or sentiments.

WE WILL, upon request, bargain collectively with DISTRICT 9, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, as the exclusive representative of all the employees in the bargaining unit described below concerning rates of pay, wages, hours of employment, and other conditions of employment, and, if an agreement is reached, embody it in a signed agreement. The bargaining unit is:

All service and maintenance employees employed by the employer at its Moberly, Missouri, facility excluding office clerical employees, salesmen, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of youf rights to self-organization or to form, join or assist any labor organization, or to bargain collectively with us concerning terms or conditions of employment through the representative you select, or to refrain from any of these activities if you so choose, except as these rights may be affected by a contract validly made under the National Labor Relations Act, whereby membership in a labor organization is a condition of employment after the 30th day following the date of the contract or the beginning of a person's employment, whichever is later.

You and all our employees are free to become or remain, or to refrain from becoming members of or withdrawing membership in any labor organization.

NOLL MOTORS, INC.
(Employer)

Dated ..... By .....
(Representative)

.....
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 610

Federal Building, 601 E. 12th Street, Kansas City, Missouri 64106 (Tel. No. FR. 4-5181).

[Caption Omitted in Printing]

ERRATUM

Through inadvertence Appendix A of Trial Examiner's Decision date October 26, 1967, was not attached. Such error is hereby corrected and attached to this Erratum of this date.

/s/ Thomas F. Maher
Trial Examiner

Dated: October 30, 1967

TXD APPENDIX A

As most of you already know, I am not much of a speech maker and when I do speak, I don't normally write it all out like this. I am reading this today, because I don't want somebody to say I said something that I did not say.

To come quickly to the point, the labor union, as you all know, is here in town trying to sell union memberships. These union membership salesmen have been practically going from house to house like vacuum cleaner and magazine salesmen. Like these vacuum cleaner and magazine salesmen, these union membership salesmen have a job to do and can make many promises. Now, I do want to make one thing real clear here—a sucker is born every minute but maybe I can keep you from making a mistake. These salesmen of union memberships can promise you almost anything—$1.00 an hour raise—a new car every year or what not but they can't even guarantee you that if you vote for the union they will get any contract at all signed. All they can promise is the best contract they can work out.

What was it—about 10 or 12 years ago the union won an election over here—and they negotiated and negotiated—but no contract was ever signed and the employees voted the union out entirely about a year later. At this time no one can say what if anything anyone would do except we would bargain in good faith. No one knows now if any agreement would be reached. These union men will often tell you anything to make a sale of a union membership. They may promise pensions or more holidays or money—how long was it they had pickets at our place in 1948—I think it was for two or three months but the union officials never got any contract signed at all. They promised a lot but they

simply were not able to deliver besides leaving town and did not pay the men for picketing. I'll do my best for you, but as I hope you already know—the other garages in town hope we will have trouble so they will get the work that you are now doing. And this I don't believe will help any one of you or your company pay your bills.

No doubt, we have made some mistakes here at this company but feel we have done our very best. I simply do not see how bringing in some outsider is going to help us solve any of our problems—in fact it can be a trouble maker. As you know, the union is just that—trouble in the past. You don't hear of strikes in non union plants, do you? I don't believe you want to invite the union in here and put yourself in a position where someone in St. Louis can say "hit the streets," do you? Some of you might say—well, even if the union management in St. Louis did say "hit the streets" I wouldn't do it. Maybe you wouldn't but the union is always telling you that you ought to do this and so because everyone else is doing it—and I suppose that could include striking and walking the picket line whether or not you could meet your house, car or tax, and mortgage payments. This sort of go along with the crowd talk doesn't put money in your pay envelope. I'm sure none of us want the Adolph Hitler group thinking in this country. Our families mean so much to us to do otherwise. Just because someone else wants to be a fool doesn't mean we have to do so also. Sometimes you know, misery love company—and some people have made foolish mistakes and they want to pull other men along with them so their mistakes won't look so foolish.

These union salesmen are not like our salesmen on our sales force—if our salesmen misdepresent some-

thing, we have to live with those people the rest of their lives—not so with union salesmen—one group of union membership salesmen can come into town and canvass the town, get the dues, etc., and then another group can come in and get paid for collective bargaining, etc. They don't have to stay in town and face the music. They can promise all sorts of things they are going to get me to do—and then leave town.

As for honesty—didn't some of you tell me that when they got you to sign the union cards, they told you that before they did anything they were going to get all the dealers, garages and filling stations to sign up. They weren't truthful with you! They haven't done that. Businesses and people are already leaving Moberly and Randolph county. We have less population now than we had here 20 years ago. The union over at the shoe factroy alone, I am told, took over 600 jobs out of town—and I wish we had the service and sales of those people in town right now. I don't know what the situation will be there with the MFA Packing plant at Macon as the union won an election over there but MFA closed the plant. Whether it was because of the union, I don't know. I certainly hope the people over here will not foul up the town so much with the union. We could use big business to help hold our young people in this area—and frankly to provide more work for us all. I am worried about the Bersted plant.

While I want to make it perfectly clear that you have every right to vote union or not as you choose, I hope you will not bring in these potential friction makers into our group. I certainly do not feel guilty in the least in asking you to vote *No*—meaning no union. A year from now or later if you are not satisfied you can bring the union in—but once in the unions are not easy to get out.

I understand fully why some of these people in large companies must have unions if anyone is going to know they exist as an individual. That is certainly not true here and you know it. It has not been at all begrudgingly that we have provided paid holidays, vacations, and the pay that we have. As you know dealers here in this town already pay 5% more on work than the mechanics in the shop got in percent in Kansas City after striking for two or three months. Frankly, I think we all here have far more to gain by voting *No*—meaning "No Union" and then us working together for our mutual improvement and betterment than we are to have the paid professional trouble-makers of St. Louis and Kansas City in here.

Did you ever stop to think what these paid union professional salesmen of union memberships have to gain from selling just 100 memberships to garages, filling stations, and dealers? Let me tell you—in ten years alone about $75,000—which is out of the pockets of these employees. You talk in those figures—you can see why they drool after these union memberships.

Please don't misunderstand me—I'm not in the least mad at any of you who signed these union cards. Some of you were out right misled—and others of you just went along without knowing what it was all about. From now on I do figure that you know more about the whole situation.

You do what you want to—it is a free country—I've told you how I feel and why I think we are all much better off working together than fighting. Don't think I am afraid, I'm not. I can hire experts to negotiate for me—but as I said I feel we spend too much of our time together to have a lot of friction. We can, do us all a favor, by voting "No Union" in this thing and get-

ting over as soon as possible so that we can work things out together. I hope you all agree. Thanks very much for your time and if you have any questions, ask.

APPENDIX E

Trial Examiner's Exhibits 3 and 4; *see* (A.5, 105-107).

TO THE FEDERAL LABOR RELATIONS BOARD:

We the undersigned employees of Noll Motors, Inc., Moberly, Missouri, were led to believe that the signing of the union cards was only a formality to allow an election and therefore have decided that we want no part of the union.

Donald Eugene Moore
Wm. J. Perkins
Donald Kroner
Jerry McCallum
Mike McCallum
Leon Newby
Charles Staiger
Ben Hamilton
Lyle R. Beveridge
Robert Austin
Lennie Broemer
Edgar Williams
Tom Jackson

NOTE: One other employee, who was hired after the election, also signed the letter; apparently as an indication that he also wished "no part of the union."

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1345

NOLL MOTORS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

1. The Board found that the Company violated Section 8(a)(1) of the National Labor Relations Act by engaging in the following activities: During an election campaign by the Union (International Association of Machinists, AFL–CIO), the Company's president called a meeting of the employees at which he questioned them individually about their reasons for wanting a union, and stated that, if the Union got in, the Company would have to operate under more stringent work standards that all the employees could not meet. The president also prepared a speech, which a foreman delivered at a second employee meet-

419-701—71

ing. He warned that unions cause trouble and strikes, that the Union would call a strike whether or not the employees could meet their living expenses or financial obligations, and that a plant where the union had won an election had closed.[1] In addition, the Company's garage manager promised two employees benefits if the Union were defeated in the forthcoming election (Pet. App. 47–48, 60–62). The Board further found that the Company violated Section 8(a)(5) of the Act by refusing the Union's request to bargain at a time when the Union possessed valid authorization cards from a majority of the employees, and that the Company's subsequent 8(a)(1) violations tended to undermine the Union's majority status and render a fair election unlikely (Pet. App. 48, 64–68). Accordingly the Board ordered the Company, *inter alia*, to bargain with the Union upon request (Pet. App. 48–49, 71–73).

The court of appeals, applying the principles enunciated in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, sustained the Board's unfair labor practice findings and enforced its order (Pet. App. 40–45).

2. Petitioner's basic contention is that the Board and the court below misapplied *Gissel* because the

[1] The relevant portions of this speech (Pet. App. 58–59, 77–81) are similar to the statements that this Court, in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 616–620 (the *Sinclair* case), found amounted to threats of plant closure. The foreman stated that he was reading the speech for the president in his absence (R. 49). ("R" refers to the printed record in the court below.)

Company's violations of Section 8(a)(1) were not serious enough to support a bargaining order (Pet. 8–19.[2] This issue involves only an evaluation of the facts of this particular case and hence does not warrant review by this Court. Moreover, a comparison of the employer statements here with those in *Sinclair,* one of the companion cases to *Gissel,* reveals that they are essentially similar (see n. 1, *supra*). The Court in *Sinclair* sustained the Board's finding that such statements constituted "threats of reprisal [which] were so coercive that, even in the absence of a § 8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of those threats." 395 U.S. at 615, 620.[3]

---

[2] In *Gissel*, this Court recognized that a bargaining order was appropriate in both "'exceptional' cases marked by 'outrageous' or 'pervasive' unfair labor practices," and "cases marked by less pervasive practices which nonetheless still have a tendency to undermine majority strength and impede the election processes." It noted, however, that "there is still a third category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargain order." 395 U.S. at 613–615.

[3] Petitioner's contention (Pet. 10–17) that the unfair labor practices here were less serious than those in other post-*Gissel* cases where the Board did not issue bargaining orders does not withstand analysis. In none of the cases cited by petitioner did the company president disseminate statements to all the employees which were found to contain threats of reprisal. Those cases merely involved isolated incidents of interrogation and threats directed to individual employees by lesser company representatives. *Olney Motels, Inc.*, 176 NLRB No. 111, 71 LRRM 1516, is inapposite, since there the union did not possess a card majority. *National Labor Relations Board* v. *General Stencils*, 76 LRRM 2288 (C.A. 2), January 19, 1971, is similarly distinguishable. As Judge Friendly there stated, in remanding the

3. Petitioner's contention that the passage of time since the signing of the authorization cards and the commission of the unfair labor practices (Pet. 28–30) nullifies the propriety of a bargaining order likewise does not warrant further review. In *Gissel*, the Court indicated that this consideration is ordinarily irrelevant in determining the propriety of a bargaining order. 395 U.S. at 610–612. *Clark's Gamble Corp.* v. *National Labor Relations Board,* 422 F. 2d 845 (C.A. 6), certiorari denied, October 19, 1970, No. 265, 1970 Term, and *National Labor Relations Board* v. *American Cable Systems, Inc.,* 427 F. 2d 446 (C.A. 5), certiorari denied, December 14, 1970, No. 737, 1970 Term, are distinguishable. Those cases dealt with the effect of employee turnover, not the passage of time as such. See also *National Labor Relations Board* v. *American Art Industries, Inc.,* 75 LRRM 2352 (C.A. 5), September 9, 1970, certiorari denied, February 22, 1971, No. 995, 1970 Term.[4]

---

case to the Board to reconsider the propriety of a bargaining order after the court had set aside some of the Board's unfair labor practice findings: "On the other hand, if there had been evidence of *widespread dissemination* of the threat of plant closure (such as the speech, the letters and the pamphlet sent to all employees in the *Sinclair* case) this would * * * clearly support a bargaining order * * *" (emphasis added). 76 LRRM at 2294.

[4] Petitioner's contention (Pet. 25–28) that the authorization cards were tainted because they were secured by misrepresentations is not properly presented here. The Trial Examiner found that all 15 of the cards submitted by the Union were free of misrepresentations and had been validly signed by the employees involved. The Company did not file exceptions with the Board with respect to these findings. Having failed to except to the Trial Examiner's findings, the Company is precluded by

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

MARCH 1971.

Section 10(e) of the Act, 29 U.S.C. 160(e), from challenging them in court. *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 256; *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 388–389.

U. S. GOVERNMENT PRINTING OFFICE: 1971